Supreme Court
FILED
95-69 JUL 11 1995

No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PEG KERNAN, WARDEN, *Petitioner*,

v.

THEODORE ANTHONY WESTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
ANN K. JENSEN
Supervising Deputy Attorney General
Counsel of Record
GEORGE F. HINDALL III (143229)
Deputy Attorney General
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6110
Counsel for Petitioner

120 pp

QUESTIONS PRESENTED

1. Whether a state court's determination that a criminal defendant consented to a declaration of mistrial for purposes of the Double Jeopardy Clause is a finding of fact entitled to the presumption of correctness of 28 U.S.C. § 2254(d).

2. Whether the Ninth Circuit's conclusion that there was no manifest necessity justifying the state trial court's decision to declare a mistrial was consistent with the holding of *Arizona v. Washington*, 434 U.S. 497 (1978) that a reviewing court must accord a trial court's decision to declare a mistrial based on potential juror bias "the highest degree of respect."

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995
No. __-____

PEG KERNAN, WARDEN, *Petitioner*,

v.

THEODORE ANTHONY WESTON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Peg Kernan, Warden, California State Prison at Solano, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was reported at 50 F.3d 633; a copy of the opinion appears as Appendix A. The order of the United States District Court for the Northern District of California granting the petition for writ of habeas corpus was unreported; a copy of the order appears as Appendix B. A copy of the order of the California Supreme Court denying the petition for review appears as Appendix C. The opinion of the California Court of Appeal, First Appellate District, was unreported; a copy of the opinion appears as Appendix D. A copy of the order of the Ninth Circuit denying rehearing appears as Appendix E.

JURISDICTION

The court of appeals entered its judgment on February 24, 1995 (App. A), and its order denying rehearing on April 12, 1995 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . ."

Title 28, section 2254 of the United States Code provides in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be

presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his

constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such

factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal Court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

In January 1990, an information was filed in the Superior Court of the State of California for the City and County of San Francisco charging respondent Theodore Anthony Weston with three counts of forcible oral copulation (Cal. Penal Code § 288a(c)) and one count of robbery (Cal. Penal Code § 211). It was further alleged that respondent had kidnapped the victim for the purpose of committing the sex offenses (Cal. Penal Code § 667.8), had a prior conviction for forcible oral copulation (Cal. Penal Code § 667.6(a)), and had served two prior prison terms (Cal. Penal Code § 667.5(b)). (CT at 1-4.)[1/]

Respondent's first jury trial began in March 1990. During the rebuttal phase of his case, the prosecutor proposed to call two witnesses to testify to

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1. "CT" refers to the clerk's transcript of the state trial court proceedings; "RT" refers to the reporter's transcript of the state trial court proceedings.

statements respondent had allegedly made regarding where he was living at the time of the charged offenses. The first witness, a police officer, testified that, about two weeks after the date on which the charged offenses were allegedly committed, he had arrested respondent for check fraud. Defense counsel immediately objected and moved for a mistrial. The state trial court ordered the testimony stricken, admonished the prosecutor and the jury, and took the motion for mistrial under submission. The second witness testified that he was a parole officer and knew respondent because he maintained a file on him.[2/] (RT at 401-04, 415-18, 421-23.)

Following this testimony, defense counsel again moved for a mistrial, arguing that the prosecutor had intentionally elicited improper testimony regarding respondent's prior arrest, and that both the testimony

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2. The state trial court had refused a defense request to "sanitize" the parole officer's testimony to omit any reference to his occupation. (RT at 401-02.)

about the prior arrest and the testimony about respondent's parole status was inadmissible and prejudicial to the defense. Defense counsel then urged the state trial court to declare a mistrial on its own motion. The court responded that it would not declare a mistrial except on motion by the defense, as otherwise "you've got double jeopardy." After discussing the consequences of double jeopardy, the court asked defense counsel, "anyway, you made a motion for mistrial, am I correct?" Defense counsel answered, "yes." After listening to the prosecutor's response to the motion, the court announced that it was taking the motion under submission. (RT at 424-28.)

The following day, defense counsel filed a written motion for a mistrial with prejudice on the ground that the prosecutor had intentionally goaded the defense into moving for a mistrial. The written motion

included a request for cautionary instructions in the event it was denied. (CT at 127-33.)

That morning, the state trial court heard further argument on the subject of mistrial. Defense counsel again argued that the prosecutor had intentionally elicited inadmissible evidence of the prior arrest. He also argued that the evidence of the prior arrest and of respondent's parole status was "devastating" and had "robbed me of my chances in this case." (RT at 434-36.)

The state trial court first found that the prosecutor had not intended to goad the defense into moving for a mistrial. It also found, however, that the testimony about respondent's prior arrest and parole status was inadmissible and prejudicial to the defense. The court therefore granted the motion for mistrial. (RT at 438-39.)

Defense counsel immediately protested that his motion for mistrial had been based solely on the ground

that the prosecutor had intentionally goaded the defense into moving for a mistrial, and that since the court had ruled against him on that issue, he wished to consult further with his client. The court responded that it had granted the oral motion for mistrial which defense counsel had made the previous day and which the court had taken under submission, and that it no longer had jurisdiction over the case. (RT at 439-40.)

After the jurors returned to the courtroom, the state judge explained that he had granted the motion for mistrial because the jury had heard improper testimony about respondent's prior arrest and parole status, and that respondent was "not getting a fair trial under those circumstances because [the improper testimony] is terribly prejudicial." The court expressly stated that it had considered giving curative instructions, but felt that it would be difficult for the jury to follow such instructions under the circumstances. (RT at 440-41.)

Before his second trial, respondent moved to enter a plea of once in jeopardy and to dismiss the information on the ground of double jeopardy. The state trial court denied the motion. Respondent then filed a petition for writ of mandate or prohibition in the California Court of Appeal, First Appellate District, again raising the double jeopardy claim; that petition was also denied. (CT at 137-69, 178, 180.)

Respondent's second jury trial took place in May 1990, and resulted in a guilty verdict on one count of forcible oral copulation. The jury was unable to reach a verdict on the other counts or the kidnapping allegations, which were later dismissed. The state trial court found true the prior conviction and prior prison term allegations, and sentenced respondent to eleven years in state prison. (CT at 241, 361, 403-07, 443-44.)

Respondent appealed his conviction to the California Court of Appeal, First Appellate District,

claiming, inter alia, that his second trial constituted double jeopardy under both the federal and state constitutions. The California Court of Appeal affirmed, holding that respondent, by his requests for mistrial, had consented to the mistrial declared in his first trial, and that, consequently, his second trial did not constitute double jeopardy. The California Supreme Court denied respondent's petition for review. (App. C, D.)

Respondent later filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of California, raising, inter alia, his double jeopardy claim. The district court granted his petition, holding that respondent had not consented to a mistrial without prejudice, that there was no "manifest necessity" which would justify a mistrial without his consent, and that the

second trial therefore violated the Double Jeopardy Clause of the Fifth Amendment.[3/] (App. B.)

Petitioner appealed the district court's order granting the petition for writ of habeas corpus to the United States Court of Appeals for the Ninth Circuit. A divided Ninth Circuit panel affirmed. The panel majority agreed with the district court that respondent had not consented to a mistrial without prejudice, and that there was no manifest necessity justifying a mistrial. In his dissenting opinion, Chief Judge Wallace disagreed with the majority on both points. Petitioner later filed a petition for rehearing with suggestion for rehearing en banc; that petition was denied on April 12, 1995. (App. A, E.)

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3. While the district court ordered petitioner to release respondent from custody, it later granted petitioner's motion to stay that order pending appeal. After the Ninth Circuit denied the petition for rehearing on April 12, 1995, the stay dissolved, and respondent was released from state custody.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the degree of deference to be accorded the determinations of state courts on federal habeas review of a state prisoner's claim that his state conviction violated the Double Jeopardy Clause.

I.

THE NINTH CIRCUIT'S DECISION IS ERRONEOUS

The circumstances under which the Double Jeopardy Clause bars a retrial after a declaration of mistrial are well-settled. If the defendant consents to the mistrial, retrial is permitted unless the defendant demonstrates that his successful motion for mistrial was based on conduct by either the prosecution or the trial court intended to provoke him into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). If, on the other hand, the defendant does not consent to the mistrial, retrial is permitted only if the prosecution shows

that "manifest necessity" justified the declaration of mistrial. *Arizona v. Washington*, *supra*, 434 U.S. at 505.

In the present case, the Ninth Circuit held that respondent did not consent to the mistrial declared in his first trial, and that the decision of the state trial court to declare a mistrial without his consent was not justified by manifest necessity; the court therefore concluded that the Double Jeopardy Clause barred retrial. The Ninth Circuit's decision, however, failed to accord due deference to the contrary determinations of the state courts.

A. The Ninth Circuit Failed To Apply The Presumption Of Correctness To The State Appellate Court's Finding Of Consent

First, despite respondent's concession that the question of whether he consented to the mistrial declared in his first trial was a question of fact, the Ninth Circuit did not presume correct the finding of the California Court of Appeal that respondent had consented to the

mistrial. Under 28 U.S.C. § 2254(d), a federal court must presume correct a factual finding by a state court unless it concludes that the petitioner was not afforded a fair hearing on the issue or that the record does not fairly support the finding. The presumption applies to factual determinations by state appellate courts. *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981). If the federal court concludes that the state hearing was inadequate or that the record does not support the finding, it must state reasons for these conclusions in its opinion. *Id.* at 551. The Ninth Circuit failed even to mention the California Court of Appeal's finding of consent in its opinion, and denied a petition for rehearing alerting it to the omission. Presumably, then, the Ninth Circuit concluded *sub silentio* that the question of whether a defendant consented to a mistrial is not a question of fact.

This conclusion was erroneous. As a matter of common sense, the question of whether a defendant consented to a mistrial would appear to be one of fact. This Court has held that consent is a factual issue in the context of a defendant's consent to search, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), and there does not appear to be any reason why a different rule would apply to a defendant's consent to a mistrial. The question does not lose its factual character merely because its resolution might be dispositive of the ultimate constitutional question. *Miller v. Fenton*, 474 U.S. 104, 113 (1985). And a determination of whether a defendant consented to a mistrial appears no less factual than other determinations which this Court has held to be entitled to a presumption of correctness under § 2254(d). *See Wainwright v. Witt*, 469 U.S. 412, 426-30 (1985) (determination that prospective juror in capital case was properly challenged for cause); *Rushen v. Spain*,

464 U.S. 114 (1983) (assessment of effect of *ex parte* communication with judge on impartiality of individual juror); *Maggio v. Fulford*, 462 U.S. 111 (1983) (assessment of defendant's competence to stand trial); *Marshall v. Lonberger*, 459 U.S. 422, 431-37 (1983) (determination that defendant received and understood sufficient notice of charges against him to render guilty plea voluntary).

Had the Ninth Circuit recognized that the California Court of Appeal's determination that respondent had consented to the mistrial was a finding of fact, it could not have reached the result it did in this case. The proceedings in the California Court of Appeal afforded respondent an adequate hearing on the issue of consent. *See Sumner*, 449 U.S. at 546. Moreover, the record amply supports the state appellate court's finding that respondent consented to the mistrial. As Chief Judge Wallace demonstrates in his dissenting opinion, the

record in this case fairly supports a finding that defense counsel moved for mistrial on two separate grounds (the alleged goading by the prosecutor, and the prejudice resulting from the improper testimony), that the state trial court granted the motion on the latter ground, and that respondent therefore consented to the mistrial declared by the state trial court. 50 F.3d at 640-42. The Ninth Circuit therefore erred in failing to presume the correctness of the state appellate court's finding of consent.

B. The Ninth Circuit Failed To Accord The State Trial Court's Decision To Declare A Mistrial The "Highest Degree Of Respect"

Second, the Ninth Circuit failed to accord proper deference to the state trial court's decision to declare a mistrial in the first trial. In *Arizona v. Washington*, *supra*, this Court held that a trial court's decision to declare a mistrial based on its assessment of the prejudicial impact of improper comments heard by the jury is entitled to

"the highest degree of respect" from a reviewing court. 434 U.S. at 511. Applying this standard, the Court held that, even though the trial judge did not expressly state that he had considered alternatives to mistrial and found them inadequate, he nevertheless soundly exercised his discretion in declaring a mistrial without the defendant's consent. *Id.* at 514-17.

In the instant case, the Ninth Circuit, while purporting to apply the deferential standard of review announced in *Washington*, actually substituted its own judgement as to the necessity of a mistrial for that of the state trial court. The Ninth Circuit opined that the state trial court abused its discretion when it declared the mistrial in that it failed to "properly consider" alternatives to mistrial and respondent's interests. 50 F.3d at 639. The record shows, however, that the state trial court expressly considered the alternative of curative instructions, but rejected it as inadequate. (RT at 440-

41.) It also shows that the state trial court declared a mistrial because it believed the improper testimony regarding respondent's prior arrest and parole status was so prejudicial that it denied him his right to a fair trial. (RT at 440-41.) The state trial judge's opinion was consistent with defense counsel's stated view that the improper testimony was "devastating" and had "robbed" the defense of what counsel claimed was a "good shot" at an acquittal. (RT at 435-36.) It is therefore clear that the Ninth Circuit failed to accord "the highest degree of respect" to the state trial court's decision. *See* 50 F.3d at 642 (Wallace, C.J., dissenting). Had it done so, it could not have reached the result it did.

II.

THE QUESTIONS PRESENTED ARE IMPORTANT

The Ninth Circuit's opinion in this case sets a dangerous precedent. By failing to apply a presumption of correctness to the state appellate court's finding that

respondent consented to a mistrial, the opinion will encourage defendants to purposefully create confusion as to whether they have consented to a mistrial in the hope that a federal habeas court reviewing the issue de novo will later decide such consent was lacking. By failing to defer to the state trial court's decision to declare a mistrial, the opinion "will unduly chill trial courts from exercising their discretion to declare mistrials when necessary." 50 F.3d at 642 (Wallace, C.J., dissenting); *see Washington*, 434 U.S. at 513. The state's interest in having the determinations of its courts accorded appropriate deference in federal habeas proceedings is particularly strong in cases involving double jeopardy, as the consequences of that failure may include not only the reversal of a state conviction, but a permanent bar to retrial. Petitioner therefore respectfully urges the Court to grant review in this case.

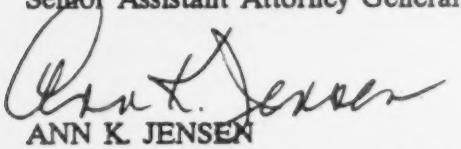
CONCLUSION

For the foregoing reasons, petitioner respectfully asks that the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Dated: July 11, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General



ANN K. JENSEN
Supervising Deputy Attorney General
Counsel of Record
GEORGE F. HINDALL III
Deputy Attorney General
Counsel of Record

Counsel for Appellant

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE A. WESTON,
Petitioner-Appellee,

v.

PEG KERNAN, WARDEN,
Respondent-Appellant.

No. 94-15391
D.C. No.
CV-92-4190-MHP
OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
December 14, 1994—San Francisco, California

Filed February 24, 1995

Before: J. Clifford Wallace, Chief Judge, Harry Pregerson and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer; Dissent by Chief Judge Wallace

SUMMARY

Criminal Law and Procedure/Double Jeopardy/ Litigation and Procedure

The court of appeals affirmed a district court judgment. The court held that a defendant's second trial was barred by the Double Jeopardy Clause, where the mistrial without prejudice that had been granted in the defendant's first trial was granted without the defendant's consent and defense counsel immediately objected.

Appellee Theodore Weston was charged in state court with forcible oral copulation. During the rebuttal phase of trial, the prosecutor proposed to call two witnesses who would testify solely to the issue of Weston's address. The first witness, a police officer, testified that he placed Weston under arrest for check fraud. Defense counsel, Jeffrey Adachi, immediately objected and requested a mistrial. The state trial judge responded by striking the testimony and admonishing the prosecutor. The other witness, a parole officer, testified that he knew Weston because he maintained a parole file on him.

Adachi asked the court to declare a mistrial sua sponte. The court responded that it would not do so because jeopardy would attach. The court then asked Adachi whether he was moving for a mistrial. Adachi responded "yes." The judge took the motion under advisement and the court adjourned for the day. The next morning, Weston filed a written motion requesting that the court declare a mistrial with prejudice on the grounds of the prosecutor's misconduct. The motion stated that if the court decided not to declare a mistrial sua sponte, the defense requested cautionary instructions to the jury.

The state trial court declared a mistrial without prejudice, finding that the cumulative error of the police officer's and the parole agent's testimony was prejudicial to the defendant. Immediately after the mistrial was ordered, Adachi interrupted the court, explaining that he wanted to confer with Weston before the court declared the mistrial without prejudice. The judge responded that he no longer had jurisdiction over the case.

Weston moved to enter a plea of once in jeopardy and to dismiss the information. The state trial court denied his motion, and his petition for a writ of mandate to the California Court of Appeal on his double jeopardy claim was also denied.

Weston's second trial resulted in a jury verdict of guilty. He appealed to the California Court of Appeal, contending that the second trial placed him twice in jeopardy. The California Court of Appeal affirmed his conviction, and the California Supreme Court denied his petition for review.

Weston filed a habeas corpus action in the district court. The court granted the petition, ordering the State of California to release Weston from custody. Appellant, Warden Peg Kernan, appealed.

[1] Upon declaration of a mistrial, retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by "manifest necessity."

[2] In this case, Weston did not consent to the mistrial and the state trial court erred in declaring the mistrial without prejudice over defense counsel's repeated objections. The circumstances of this case clearly indicated that Weston did not acquiesce in the mistrial order. [3] The first exchange between the state trial judge and defense counsel may have been ambiguous because Weston did not explicitly limit his request to a mistrial with prejudice. The written motion on the following day, however, made clear that Weston only desired a mistrial if jeopardy would attach. Even if the two motions were viewed as separate and distinct, one for a mistrial without prejudice and one for a mistrial with prejudice, the state trial judge wholly failed to determine whether the later written motion superseded and effectively revoked the earlier request. [4] Moreover, defense counsel's immediate and repeated objections demonstrated that Weston did not consent to the mistrial. [5] Because Weston's written motion requested only that the judge declare a mistrial sua sponte and defense counsel immediately objected to the mistrial order, the state trial court was required to obtain Weston's consent to the mistrial in the manner that it was declared.

[6] The state trial court did not properly consider alternatives to a mistrial and did not determine that the mistrial

would be in Weston's best interests. [7] "Manifest necessity" did not exist and declaration of the mistrial over Weston's objection and without his consent was unwarranted. [8] Weston's second trial was barred by the Double Jeopardy Clause.

Chief Judge Wallace dissented, stating that the record showed that Weston consented to the first mistrial without prejudice, and, even if that were not so, the state judge properly exercised his discretion and declared the mistrial on the grounds of manifest necessity.

COUNSEL

George H. Hindall III, Deputy Attorney General, San Francisco, California, for the respondent-appellant.

Bruce E. Cohen, Berkeley, California, for the petitioner-appellee.

OPINION

BEEZER, Circuit Judge:

Petitioner Theodore Weston filed a petition for a writ of habeas corpus challenging his May 1990 state court conviction of forcible oral copulation. He contends that his conviction was barred by the Double Jeopardy Clause because the state trial court ended his first trial by declaring a mistrial without his consent and in the absence of manifest necessity.

The district court granted his petition on February 9, 1994. The district court had jurisdiction pursuant to 28 U.S.C. § 2254 and we have jurisdiction pursuant to 28 U.S.C. § 2253. We affirm.

I

Weston was charged with three counts of forcible oral copulation (Cal. Penal Code 288a(c)), one count of robbery (Cal. Penal Code § 212.5(b)), and kidnapping for the purpose of committing the offense (Cal. Penal Code § 667.8). He was also alleged to have a prior conviction for forcible oral copulation and two prior prison terms (Cal. Penal Code § 667.6(a) and § 667.5(b)).

Weston's first state trial began in March 1990. After four days of trial, the state trial court declared a mistrial without prejudice. Weston then moved to enter a plea of once in jeopardy and to dismiss the information. The state trial court denied this motion and Weston's petition for a writ of mandate to the California Court of Appeal on the double jeopardy claim was also denied.

Weston's second trial resulted in a jury verdict of guilty on one count of forcible oral copulation. The jury could not reach a verdict on the other counts and the state trial court dismissed them upon a motion by the prosecution. In June 1990, Weston was sentenced to six years for forcible oral copulation, with a five year prior conviction enhancement, for a total sentence of 11 years.

Weston appealed this conviction to the California Court of Appeal arguing, inter alia, that the second trial placed him twice in jeopardy. The California Court of Appeal affirmed his conviction and the California Supreme Court denied his petition for review.

Weston then filed this habeas corpus action in October 1992. In January 1993, the district court ordered the State to show cause why a writ should not issue. After receiving responses from the parties, the district court granted the petition, ordering the State of California to release Weston from

custody. The district court then granted the State's motion for a stay of Weston's release pending this appeal.

II

The circumstances surrounding the mistrial are as follows. During the rebuttal phase of the first trial, the prosecutor proposed to call two witnesses who would testify solely to the issue of the defendant's address. The prosecutor represented that the witnesses were being called only for the purpose of relating statements made to them by Weston concerning where he resided. The first witness, Officer Miller, testified as follows:

Q. (By Cling, Prosecutor) Did you place Mr. Weston under arrest?

A. Yes, I did.

Q. For what?

A. For 470 which is a check fraud.

(R.T. 416.)

Defense counsel, Jeffrey Adachi, immediately objected and requested a mistrial. The state trial judge responded by striking the testimony and admonishing the prosecutor for transgressing the court's order. The court took the motion for mistrial under advisement. The next witness, Barry Briden testified that he was a parole officer and knew Weston because he maintained a parole file on him. At the end of this testimony and after excusing the jury, the attorneys and the judge further discussed the mistrial matter. Adachi stated that he was moving for a mistrial because of the extraneous, irrelevant and prejudicial nature of the police officer's and parole agent's testimony. He asked the court to declare a mistrial sua sponte. The Court responded that it would not declare a mis-

trial sua sponte because jeopardy would attach. The Court then asked Adachi whether he was moving for a mistrial to which Adachi responded "yes."[1]

The judge took the motion under advisement and the court adjourned for the day. The next morning, Weston filed a written motion requesting "that the court declare a mistrial . . . on the grounds that the prosecutor, Peter Cling, by his miscon-

[1]The exact exchange is as follows:

Adachi: In any event, my position is that the court to [sic] declare a mistrial on its own motion due to -

Court: No, it is your motion, I don't make a motion. It is your motion, you want me to rule on your motion; Is that clear?

Adachi: Well, I am first asking the court to declare a mistrial.

Court: The court never declares a mistrial then you've got double jeopardy.

Adachi: That's right.

Court: Well, I am not declaring any mistrial because I don't have — don't try and trick courts into that.

Adachi: I am not trying to trick you.

. . .

Court: I don't declare mistrials. You can make a motion for a mistrial, I may grant the motion. That I may do in which case there is no jeopardy attached. If I say it is a mistrial because of something that happens then it is double jeopardy, the defendant can't be charged. I think you know very well I don't intend to do that.

. . .

Adachi: Yes, but under certain circumstances, if the prosecution makes the error we are not at fault. I think it is proper for the defense to ask the court on its own motion to, I know what the court is going to do.

Court: In forty years I never heard of it but there is a lot of stuff I never heard of in my lifetime. All right, anyway you made a motion for mistrial, am I correct?

Adachi: Yes.

(R.T. 424-26.)

duct, goaded the defense into seeking the instant motion for mistrial." Weston sought the following relief:

> Accordingly, the defense requests that this court declare a mistrial in this matter based on prosecutorial misconduct, and hold that a further retrial in this matter is barred by the Double Jeopardy Clause.
>
> If the court decides not to declare a mistrial in this matter sua sponte, the defense respectfully requests that the Court give the jurors' the attached cautionary instructions.

After further discussion, the state trial court ordered a mistrial without prejudice, finding that the cumulative error of the police officer's and the parole agent's testimony was prejudicial to the defendant. Immediately after the mistrial was ordered, Adachi interrupted the court, explaining that he wanted to confer with Weston before the court declared the mistrial without prejudice. The judge responded that he had granted a defense motion for mistrial and that he no longer had jurisdiction over the case.

When Adachi reiterated his objections, the state trial judge stated that he was granting the oral motion made by Adachi on the previous day. Adachi responded that he had moved for a mistrial on only one ground and that ground was denied by the court. The court responded, "Counsel, it was your motion last night. I made it crystal clear because you tried to lay the onus on the Court. If you want to have the record read back — In any event sit down now and be quiet, you will sit down and be quiet, Mr. Adachi. This Court has no further jurisdiction over this case." (R.T. 440.)

III

A district court's decision to grant or deny a petition for habeas corpus is reviewed de novo. *Thomas v. Brewer*, 923

F.2d 1361, 1364 (9th Cir. 1991). Findings of fact by the state court are presumptively correct, 28 U.S.C. § 2254(d), and are reviewed under the clearly erroneous standard. *Id.*

IV

Weston contends that the state trial judge declared a mistrial without his consent and without "manifest necessity" that a mistrial be declared. The State argues that the mistrial was declared pursuant to Weston's motion and that Weston consented to the mistrial. Alternatively, the State argues that manifest necessity required the mistrial.

Whether a defendant's right not to be placed in double jeopardy has been violated is reviewed *de novo*. *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991). Factual findings concerning the conduct of the prosecutor are reviewed for clear error. *Id.*

A

[1] The Double Jeopardy Clause of the Fifth Amendment protects a person from being "twice put in jeopardy of life or limb" for the same offense. The Supreme Court has enumerated several purposes for this protection: (1) to ensure the finality of judgments in criminal cases; (2) to avoid compelling a defendant to live in a constant state of anxiety and insecurity attendant with successive prosecutions for the same offense; (3) to avoid giving the prosecution an unfair opportunity to retry the defendant using information gained from the first trial concerning the strengths and weaknesses of the State's case; (4) to ensure that the defendant's right to have his fate decided by the first jury empaneled is protected; and (5) to avoid the imposition of multiple punishments for the same offense. *United States v. DiFrancesco*, 449 U.S. 117, 127-29 (1980); *United States v. Crotwell*, 896 F.2d 437 (10th Cir. 1990). *See also Green v. United States*, 355 U.S. 184, 187-88 (1957). For these reasons, upon declaration of a mis-

trial, retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by "manifest necessity." *Arizona v. Washington*, 434 U.S. 497, 505 (1978); *United States v. Perez*, 22 U.S. (Wheat. 9) 579, 580 (1824).

The critical question in Weston's double jeopardy claim is whether he consented to a mistrial without prejudice. Our overriding concern "is that the defendant retain primary control over the course to be followed" after judicial or prosecutorial error. *United States v. Dinitz*, 424 U.S. 600, 609 (1976).

The State argues that Weston's initial oral motion for mistrial was unqualified and that even after the state trial court made clear that it would not grant a mistrial with prejudice, he persisted with the motion. The State further argues that while Weston did file a written motion for a mistrial with prejudice, he never expressly withdrew his oral motion or substituted the later motion for the prior one.

In contrast, Weston argues that he was seeking a mistrial with prejudice at all times. He states that the affirmative response to the state trial judge's question, "All right, anyway you made a motion for mistrial, am I correct?" was at best equivocal. He argues that his written motion on the following day made clear that he was only seeking a mistrial with prejudice. Finally, he argues that even if the state trial court was under the impression that Weston had consented to a mistrial without prejudice, this misunderstanding should have been dispelled when counsel for Weston immediately objected and sought to speak to Weston before the judge discharged the jury.

[2] We hold that Weston did not consent to the mistrial and that the state trial court erred in declaring the mistrial without prejudice over defense counsel's repeated objections. A defendant's consent to mistrial may be inferred "only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order." *Glover v. McMackin*,

950 F.2d 1236, 1240 (6th Cir. 1991) (citation and internal quotes omitted). The circumstances of this case clearly indicate that the defendant did not acquiesce in the mistrial order.

[3] The first exchange between the state trial judge and defense counsel may have been ambiguous because Weston did not explicitly limit his request to a mistrial with prejudice. While we could view this request for a mistrial as unqualified, the written motion on the following day made clear that Weston only desired a mistrial if jeopardy would attach.[2] If the state trial judge would not declare a mistrial with prejudice, Weston requested that the trial continue and that cautionary instructions be read to the jury. Even if we were to view the two motions as separate and distinct, one for a mistrial without prejudice and one for a mistrial with prejudice, the state trial judge wholly failed to determine whether the later written motion superseded and effectively revoked the earlier request. *See, e.g., Lovinger v. Circuit Court*, 845 F.2d 739, 744 (7th Cir.) (holding that previously made mistrial motion did not constitute consent to a mistrial declared later on other grounds), *cert. denied*, 488 U.S. 851 (1988); *United States v. Mastrangelo*, 662 F.2d 946, 950 (2d Cir. 1981) (defendant may withdraw motion for mistrial, even if withdrawal is not explicit), *cert. denied*, 456 U.S. 973 (1982).

[4] Moreover, defense counsel's immediate and repeated objections demonstrate that Weston did not consent to the

[2]The fact that Weston requested the judge to declare a mistrial sua sponte, so that jeopardy would attach, does not indicate that Weston did or would consent to a mistrial without prejudice. *See United States v. Huang*, 960 F.2d 1128, 1134 (2d Cir. 1992) (no consent to a mistrial without prejudice when the defendants had moved only for a mistrial with prejudice); *Corey v. District Court of Vermont, Unit #1, Rutland Cir.*, 917 F.2d 88, 91 (2d Cir. 1990) (no consent where defendant insisted that if mistrial was declared double jeopardy should attach and later requested that trial judge reconsider his decision to declare a mistrial). The proper inquiry is limited to consideration of whether Weston consented to or acquiesced in the mistrial that was in fact declared by the state trial judge.

mistrial. This is not a case where a defendant impliedly consented to the mistrial because he had the opportunity to object to a mistrial declared sua sponte but failed to do so. *See United States v. Smith*, 621 F.2d 350, 351-52 (9th Cir. 1980) (defense counsel's failure to object to mistrial amounted to implied consent), *cert. denied*, 449 U.S. 1087 (1981); *United States v. Bates*, 917 F.2d 388, 393 (9th Cir. 1990) (no consent when defendant has no opportunity to object to a mistrial declared sua sponte by the state trial judge). Quite the contrary, Weston's counsel strenuously objected to the mistrial. The state trial court's declaration of a mistrial over these objections deprived Weston of his right to retain primary control over the course of the proceedings. *See Dinitz*, 424 U.S. at 609.

[5] Because Weston's written motion requested only that the judge declare a mistrial sua sponte and defense counsel immediately objected to the mistrial order, the state trial court was required to obtain Weston's consent to the mistrial in the manner that it was declared. The court could have easily accomplished this clarification by allowing defense counsel to confer with Weston before he discharged the jury. *See e.g., United States v. Huang*, 960 F.2d 1128, 1133 (2d Cir. 1992) (after stating that it would not grant mistrial with prejudice, court gave defendants opportunity to withdraw their motion for mistrial); *United States v. Miller*, 742 F.2d 1279, 1284 (11th Cir. 1984) (to ensure no double jeopardy problem after declaration of mistrial, judge obtained written waiver by defendant of any double jeopardy claim), *cert. denied*, 469 U.S. 1216 (1985).

The mistrial declaration without Weston's clear acquiescence, deprived Weston of an opportunity to decide whether he wanted to allow the first jury empaneled decide his fate. *See Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) ("one of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to

have his trial completed by the first jury empaneled to try him"). We hold that Weston did not consent to the mistrial.

B

The question whether the mistrial was declared due to "manifest necessity" remains. The Supreme Court says that manifest necessity exists "when the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn*, 400 U.S. 470, 485 (1971). We must weigh the protections afforded by the Double Jeopardy Clause against society's interest in determining guilt or innocence, *Wade v. Hunter*, 336 U.S. 684, 689 (1949), and we afford the state trial court discretion in evaluating the circumstances before it in deciding whether to declare a mistrial. *United States v. Bates*, 917 F.2d 388, 394 (9th Cir. 1990).[3] The State bears the heavy burden of demonstrating the "high degree" of necessity required for a declaration of mistrial without the defendant's consent. *Arizona v. Washington*, 434 U.S. at 505-06.

In *Bates*, we established standards to be used in determining whether the state trial court properly exercised its discretion. First, "[w]hen an error certain to result in reversal occurs," manifest necessity is apparent. *Bates*, 917 F.2d at 395. If such an error exists, double jeopardy will not attach to a declaration of mistrial. It is highly unlikely that the error in

[3]The level of deference to be afforded a trial court's decision to declare a mistrial varies with the circumstances of each case. We accord a trial court's decision to declare a mistrial on the basis of juror bias "the highest degree of respect" and deference. *Arizona v. Washington*, 434 U.S. at 510. However, *Washington* cautions that reviewing courts have the obligation to ensure that a trial court exercised "sound discretion" in declaring a mistrial. *Id.* at 511. The trial judge "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Id. (quoting United States v. Jorn*, 400 U.S. 470, 486 (1971)).

this case would have resulted in a reversal of Weston's conviction. The State agrees and does not argue for a finding of manifest necessity on this ground.

Second, if it is uncertain that reversal would have resulted, four factors should be considered in determining whether the state trial court properly exercised its discretion. These factors are (1) whether the state trial court heard the position of the parties with regard to a mistrial; (2) whether it considered alternatives to granting a mistrial; (3) whether it acted deliberately and not abruptly; and (4) whether it determined the defendant would benefit from a mistrial. *Bates*, 917 F.2d at 395-96.

The first and third of these factors may be considered together in this case. The state trial court heard argument from both parties concerning the propriety of a mistrial and deliberated over the issue overnight. The next day the judge again heard argument from the parties and considered Weston's written motion before declaring the mistrial. The record demonstrates that the state trial judge acted deliberately in determining that a mistrial was required. However, the judge acted abruptly by cutting off Adachi's objections and refusing to allow him to confer with Weston before he discharged the jury.

[6] The state trial court did not properly consider alternatives to a mistrial and did not determine that the mistrial would be in the defendant's best interests. When the improper questioning occurred, the state trial court immediately struck the offending testimony from the record and admonished the jury to disregard it. The court gave little thought to the beneficial impact of this action on the jury or to the curative value of limiting instructions on any prejudice resulting from the improper testimony. Weston requested this exact form of relief in the event that the state trial court declined to grant a mistrial with prejudice. The error in this case was such that curative instructions may well have eradicated any juror prej-

udice. We conclude that the state trial court did not adequately consider these alternatives.

The state trial judge also did not properly consider whether the mistrial would benefit Weston. In ruling that the statements were prejudicial, the state trial court did not consider whether the prejudicial impact of the statements would be outweighed by the harm caused to Weston by allowing the prosecution a second trial opportunity. Weston contends that the first trial was going very well for him at the time the mistrial was declared. He also contends that the state improved its case in the second trial by finding new evidence, by finding a new witness and by calling an important defense witness as its own.

[7] Weighing these four factors in light of the error that occurred in this case, we conclude that manifest necessity did not exist and declaration of the mistrial over Weston's objection and without his consent was unwarranted.

V

[8] We conclude that Weston's second trial was barred by the Double Jeopardy Clause of the Fifth Amendment. Questions presented concerning Weston's second trial are moot. AFFIRMED

WALLACE, Chief Judge, dissenting:

My colleagues conclude that Weston did not consent to the mistrial declared in his first trial, and that the mistrial was not declared for manifest necessity. On the contrary, the record shows that Weston consented to the first mistrial without prejudice. Even if that were not so, the state judge properly exercised his discretion and declared the mistrial on the grounds of manifest necessity. Furthermore, because any improper

comments made by the state judge in the second trial were not unduly prejudicial, I would reverse the district court's issuance of the writ.

I

The circumstances surrounding a mistrial will dictate whether the Double Jeopardy Clause bars retrial. If Weston consented to the mistrial, retrial is allowed. *United States v. Bates*, 917 F.2d 388, 392 (9th Cir. 1991) (*Bates*). If Weston did not consent, retrial will be permitted only if justified by "manifest necessity." *Id.* However, even if the mistrial was declared at Weston's request, the Double Jeopardy Clause will still bar retrial if he "can show that the 'conduct giving rise to the successful motion for mistrial was intended to provoke [him] into moving for a mistrial.' " *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991) (*Lun*), *quoting Oregon v. Kennedy*, 456 U.S. 667, 679 (1982).

The majority considers Weston's consent to a mistrial without prejudice as ambiguous, and states that the district court "wholly failed to determine whether the later written motion superseded and effectively revoked the earlier request." Maj. op. at 2081. The record does not support this analysis. Weston argues that he did not consent to the mistrial in this case unless it was to be with prejudice. But a fair reading of the entire record, in context, supports a finding that Weston did consent.

The first mention of any motion for mistrial comes where Weston's attorney, Mr.Adachi, states:

> I have a motion for a mistrial, your honor. As the court just heard the prosecutor elicited certain information . . . [that] was totally extraneous to the case here . . . and I assume [the prosecutor] had knowledge of what his witness was going to say before he put him up on this.

The charge here was that the prosecutor intentionally "goaded" Weston's attorney into asking for a mistrial. A mistrial on those grounds, under *Kennedy* and *Lun*, would bar retrial. So at this point, what the defense was asking for was a mistrial with prejudice.

But the state judge quickly responded to that view of events by stating: "[The prosecutor] doesn't do that sort of thing." Weston's attorney then replied, "I am not accusing [the prosecutor]" and went on to say:

> *[A]nyway in addition* it was, I think *also* extraneous and unnecessar[ily] cumulative as well as prejudicial to have the parole officer come up here. Now the jury not only knows that when he is arrested he is involved in check fraud, but [that] he is on parole.

(Emphasis added.)

This was, in effect, a second basis for a mistrial, based on prejudice. Weston's attorney then changes the direction of the conversation, stating that "my position is that the court . . . declare a mistrial," at which time the judge specifically told him that the court would not declare a mistrial unless it was on motion by the defense, otherwise "you've got double jeopardy." After the discussion of the consequences of double jeopardy, the state judge said "anyway, you made a motion for a mistrial, am I correct?" Weston's attorney replied "yes."

At this point, Weston has moved for a mistrial on two grounds: goading by the prosecutor (which the state judge indicated will be unsuccessful), and on the basis of prejudice. At the end of the discussion, the state judge made sure that Weston's attorney had made the motion. Certainly Weston knew from this discussion that the state judge would not grant the mistrial on his own motion.

Thus, before the recess, the state judge had clarified that the only issue he was considering was Weston's motion for a mis-

trial based upon prejudice. This is what he took under advisement for decision the next day.

The following day, Weston's counsel submitted a new written motion for mistrial on the grounds that the prosecution intentionally goaded the defense into making the mistrial motion. That motion asked for a mistrial with prejudice. The majority somehow takes this written motion as a withdrawal of the first motion, stating that the trial judge "wholly failed" to determine if this later motion revoked the earlier request. But the trial judge is not Weston's lawyer. His lawyer had adequate time to withdraw his prior motion. He did not do so in writing or orally. Indeed, the record shows he did not intend to withdraw it.

What the majority fails to point out is that after this written motion was submitted, the court heard further argument before ruling on the mistrial. Here is what the transcript shows:

> Court: I have before me a motion for mistrial along with a memorandum filed this morning . . . . Any further argument in this matter *other than what I have already heard*?
>
> . . .
>
> Mr. Cling (Prosecutor): Your honor, the allegations that I intentionally attempted to circumvent the court's ruling I really think are preposterous. . . . I am perfectly aware of your honor's reaction to Attorneys who attempt to do something that has been ruled inadmissible.
>
> . . .
>
> Mr. Adachi (Defense Counsel): Now if Mr. Cling were an inexperienced prosecutor the court could say

that perhaps it was negligence or reckless. The statement itself I think speaks for Mr. Cling's intent.

. . .

Mr. Cling: Can I just say one more thing?

Court: Sure

Mr. Adachi: I'm not finished yet.

Mr. Cling: I thought you were.

Mr. Adachi: *Now addressing the issue of prejudice,* I think that any evidence of bad acts is always prejudicial to a defendant. The jury is going to think well he was a bad man on one occasion [so] he is a bad man on this occasion. And I really think that I had a really good shot in the case. And Mr. Cling *by his question and by his answer robbed me of my chances in this case.*

. . .

Court: All Right. First of all I am going to make an expressed finding so the record is crystal clear there was *no attempt to goad.*

. . .

Court: Secondly . . . I do think that [the testimony] creates prejudice against the defendant. . . . This cumulative error so to speak is enough for me to grant the motion. The motion for mistrial will be granted.

(Emphasis added.)

This discussion shows a number of things. It shows that the judge was aware of the written motion and memorandum submitted that morning by the defense. It also makes it clear that the state judge had in mind and would consider the arguments made the day before which focused on Weston's motion for a mistrial based upon prejudice. It further demonstrates that after the defense submitted the written motion, Adachi continued to argue to the court that the testimony was prejudicial, and that it robbed the defense of the chance for a fair trial. Of course, a mistrial granted on those grounds is without prejudice. It is clear that not only was the previous motion for a mistrial without prejudice not withdrawn by filing the written motion, but it was being pressed anew when Adachi again argued that the testimony was unfairly prejudicial. The judge found no prosecutorial goading, and this finding was not clearly erroneous. *Lun*, 944 F.2d at 644. The court then disposed of the motion for mistrial based on prosecutorial misconduct made the day before and argued for by Adachi on the second day. The judge held that the testimony about Weston's parole and prior arrest "creates prejudice against the defendant" and granted Weston's motion for a mistrial on this ground.

All this seems clear from the record. If there was any ambiguity, it occurred after the court granted the motion for a mistrial. It was only then that Adachi stated: "Judge, I wanted to talk to my client before the court [ruled]." Clearly, the judge was not under any obligation at that point to allow Adachi to withdraw his motion or to withdraw his ruling. The majority correctly points out that one of the purposes of the Double Jeopardy Clause is to allow the defendant to keep control of his fate. But that does not mean that once a judge has held a hearing over two days regarding the prejudicial nature of the testimony, he is further obligated, after making his ruling, to allow the defense to withdraw its motion. There is no rule of law that requires a judge to allow a defendant to withdraw a motion for a mistrial once it has been granted.

Adachi's statement that the prosecution had "robbed" him of his chance to win the case simply underscores the extent to which the defense was arguing prejudice. So does his statement that the testimony was "devastating." For the defense to come before us now and argue that Adachi might have gone to the jury with the first case is disingenuous in light of the assertion that the prejudicial conduct of the prosecutor was "devastating" and "robbed him" of his chances to win the case.

My reading of the entire record on this issue convinces me that Adachi made a motion for a mistrial based on two separate grounds, prosecutorial goading and prejudice, and that the judge granted the motion on the second ground. Because the motion was made by Weston, there was consent.

II

Since Weston consented to the mistrial, I would not get to the issue of whether the mistrial was justified by manifest necessity. Nevertheless, I believe the majority's analysis of this issue is also wanting.

The "degree of deference to be accorded the trial judge's determination of manifest necessity varies with the circumstances of each case." *United States v. Jarvis*, 792 F.2d 767, 769 (9th Cir.) (*Jarvis*), *cert. denied*, 479 U.S. 852 (1986). Both the Supreme Court and this court have expressly held that we must "accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Arizona v. Washington*, 434 U.S. 497, 511 (1978) (*Washington*); *Jarvis*, 792 F.2d at 769. Indeed, we may reverse the declaration of a mistrial on those grounds only if the trial judge's decision was "irrational or irresponsible." *Washington*, 434 U.S. at 514; *Jarvis*, 792 F.2d at 769, 770.

It is eminently sensible for us to accord great deference to the trial court's evaluation of the likelihood that an impermis-

sible statement would affect the outcome of the trial. The trial judge is the expert when it comes to determining how a jury will react to potentially prejudicial statements. Moreover, because he has observed the entire trial, he is in a unique position to ascertain accurately whether the statement would affect the jury's decision. Reviewing only portions of a cold record, divorced entirely from the context of the proceeding, we stand in a remarkably poor position to determine whether an improper comment may affect the jury's decision. As the Supreme Court has explained, "[t]here are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias." *Washington*, 434 U.S. at 513. It is therefore doubly perplexing that the majority insists on not following the clearly established precedent of this court and of the Supreme Court which requires us "to accord the highest degree or respect" to the trial court's decision in this case.

Finally, the majority ignores the perverse incentives its decision creates. The trial court is vested with the primary duty to protect the integrity of the trial and to ensure that the defendant gets a fair trial. While curative instructions and other sanctions often suffice to remedy prejudicial statements and testimony, "[u]nless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases." *Id.* By failing to accord deference to the trial judge's evaluation of the likelihood that the juror may have been prejudiced by the improper testimony, the majority's opinion will unduly chill trial courts from exercising their discretion to declare mistrials when necessary. As the Supreme Court has explained, "[t]he adoption of a stringent standard of appellate review in this area" will deter trial courts from exercising their discretion to declare mistrials "by a concern that any time a reviewing court disagreed with its assessment of the trial situation a retrial would automatically be barred." *Id.*

The majority correctly points out that because the error that arose in the first trial was not of the sort that would clearly

require reversal, we may include in our analysis whether the judge: (a) heard the opinions of the parties regarding the propriety of a mistrial, (b) considered alternatives and chose the one least harmful to the defendant, (c) acted with deliberation and not abruptly, and (d) determined the defendant would benefit from the mistrial. *Bates*, 917 F.2d at 395-96.

As the majority concedes, the trial judge did hear from all of the parties on the mistrial motion (in fact, there were hearings over two days), and did act with deliberation (the judge took the motion under submission the first day and heard additional argument the next day).

The majority concludes, however, that the judge did "not properly consider alternatives to a mistrial and did not determine that the mistrial would be in the defendant's best interests." Maj. op. at 2084. But the record shows that the judge did consider the alternative of giving a curative instruction, and decided that such an instruction would be insufficient. The judge explained to the jury: "The reason I granted [the mistrial] was [that] two things came into evidence that you shouldn't hear *and I think it is very hard to strike.* . . . I can tell you to forget about it *but that is hard to do*, forget about it. And that is the reason I granted a mistrial in the matter." (Emphasis added.)

The record also shows that the judge did consider the impact of the mistrial on Weston. The judge stated: "[Weston] is not getting a fair trial under [the] circumstances because [the testimony] is terribly prejudicial."

The trial judge apparently believed that the trial had been a fairly close one and that Adachi had a good chance of obtaining acquittal for Weston before the prosecutor elicited the statement that Weston was arrested for check fraud and that he was on parole. Adachi argued to the trial court that the improper comments were "devastating." As Adachi explained: "The jury now knows that the defendant was

arrested for check fraud. I specifically kept Mr. Weston off the stand for the purpose of excluding prior bad acts as I made in my earlier motion in this court in his felony convictions, now they know. They also know that he is a parolee." After pointing out that an "untouchable witness" had directly contradicted the testimony of the victim, and emphasizing that he was "[n]ow addressing the issue of prejudice," Adachi further exclaimed: "I had a really good shot in this case. And [the prosecutor] by his question and by his answer robbed me of my chances in this case."

The trial court agreed that Weston had been unduly prejudiced, and his conclusion was certainly reasonable. In what may have been a very close case, the jury was exposed to the prejudicial knowledge that the defendant had committed prior crimes and bad acts. Moreover, the defendant had forfeited his right to testify on his own behalf for the purpose of keeping this information from the jury. Thus, not only was Weston prejudiced by the jury's knowledge of his past crimes and bad acts, but he was also effectively deprived of his right to testify, a right he apparently would have wanted to exercise but for his desire to keep his prior crimes and bad acts from the jury's knowledge.

In a case like this where we review "the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment," we are required to give the judge the "highest degree of respect." *Jarvis*, 792 F.2d at 769. Because the trial court's decision to declare a mistrial was not "irrational and irresponsible," *id.* at 769, 770, but rather a thoughtful and considered exercise of his discretion in an attempt to secure for the defendant a fair trial, I must disagree with the majority's conclusion that the Double Jeopardy Clause precluded Weston's retrial.

III

Because of how I see the case, I must get to a third issue: whether the judge's comments at the second trial rose to such

a level that they deprived Weston of a fair trial. Because the scope of our review on habeas is very narrow, we must determine if the conduct rose to a level that predisposed the jury to find the defendant guilty. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974); *United States v. Bermea*, 30 F.3d 1539, 1569 (5th Cir. 1994). The judge made comments to Weston's lawyer that I believe should not have been made. However, the judge gave a curative instruction telling the jury not to be influenced by the comments from the bench. This is usually sufficient to dispose of the perceived unfairness. *See United States v. Schoor*, 597 F.2d 1303, 1308 (9th Cir. 1979) ("any prejudice flowing [from court's comments] was cured by the court's timely and several cautionary instructions"). In addition, many of the comments that Weston points to were not even made in the presence of the jury. Furthermore, the jury did not convict Weston on every charge, indicating that it took seriously his counsel's arguments. I would therefore reverse the district court's issuance of the writ on this ground as well.

IV

For the above reasons, I conclude that Weston consented to a mistrial without prejudice and, in any event, that manifest necessity has been shown. I also conclude that the trial judge's comments at the second trial did not deprive Weston of a fair trial. Because I would reverse the district court's issuance of the writ of habeas corpus on each ground relied upon by the district court, I respectfully dissent.

APPENDIX B

FILED: February 9, 1994
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THEODORE ANTHONY WESTON, Petitioner, vs. ANA M. OLIVAREZ, Acting Warden of Deuel Vocational Institution, Respondent.	No. C-92-4190 MEMORANDUM AND ORDER

Petitioner Theodore Anthony Weston is a prisoner of the State of California incarcerated at the Deuel Vocational Institution in Tracy, California. He brings this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, to challenge his May 1990 jury conviction of forcible oral copulation under California Penal Code § 288a(c) and his bench conviction on a prior conviction under California Penal Code § 667(a). Petitioner alleges that his conviction violated the double jeopardy clause of the United States Constitution because the trial court declared his

first trial a mistrial without his consent and in the absence of manifest necessity, such that retrial caused him to be put twice in jeopardy. Petitioner further alleges that during the course of his second trial the trial judge showed extreme bias against defense counsel, thereby depriving petitioner of a fair trial.

By order filed January 26, 1993 this court ordered respondent ("the State") to show cause why petitioner's request for habeas relief should not be granted. Respondent filed an answer and petitioner filed two traverses.

Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

The specific facts surrounding Mr. Weston's conviction can be summarized briefly.[1] On January 17, 1990 the San Francisco District Attorney filed an information charging Mr. Weston with committing three counts of forcible oral copulation (all against the same victim, Ms. Audrey E.) in violation of Cal. Penal Code § 288a(c), and one count of robbery in violation of Cal.Penal Code § 211; as to each count of forcible oral copulation the information alleged pursuant to

Cal. Penal Code § 667.8 that Mr. Weston kidnapped the victim for the purposes of committing the offense.[2] In addition, the information charged Mr. Weston pursuant to Cal. Penal Code § 667.6(a) with a prior conviction for forcible oral copulation, and pursuant to Cal. Penal Code § 667.5(b) with two prior prison terms. Mr. Weston pled not guilty and denied all allegations. C.T. at 1-4, 6.

Mr. Weston's first trial began on March 12, 1990. Mr. Weston did not testify at trial, but presented a defense of consent through other witnesses. On March 16, the court declared a mistrial without prejudice. C.T. at 34, 85-85a. On March 26, Mr. Weston filed a motion to enter a plea of once in jeopardy and to dismiss the information on the ground of double jeopardy; the trial court denied that motion on April 3, and Mr. Weston's petition for writ of mandate to the California Court of Appeal on the double jeopardy claim was denied on April 25. C.T. at 137-169, 178, 180.

Mr. Weston's second jury trial began on May 8, and on May 17 the jury returned a verdict of guilty on one count of forcible oral copulation; the jury failed to reach a verdict on the remaining charges. In a

bench trial on the prior conviction and prior prison term allegations, the trial judge found those allegations to be true. C.T. at 241, 361, 403-407. On June 12 Mr. Weston filed a motion for arrest of judgment on grounds of double jeopardy or, in the alternative, for a new trial on grounds of instructional error; the trial court denied the motion. C.T. at 409-424, 443.

On June 22 the trial court sentenced Mr. Weston to a middle term of six years for forcible oral copulation, plus five years for the prior conviction enhancement, for a total sentence of eleven years in state prison less 491 days credit for time served. the court dismissed the remaining counts on motion by the prosecution. C.T. at 443-44; R.T. at 1100.

Mr. Weston noticed an appeal on June 22 and filed an opening brief on January 22, 1991 arguing, inter alia, that the second trial placed Mr. Weston in double jeopardy and that the trial court's treatment of defense counsel at that trial constituted bias that deprived Mr. Weston of a fair trial. Resp. Ex. B. In December 1991 the California Court of Appeal affirmed the conviction and denied Mr. Weston's subsequent motion for rehearing. Mr. Weston sought direct review by the Supreme Court of California, but

that petition too was denied. C.T. at 445-447; Resp. Ex. B-J. Mr. Weston filed the instant action on October 20, 1992, raising two claims: (1) double jeopardy; and 92) denial of a fair trial. By order filed January 26, 1993 this court ordered the State to show cause why a writ should not issue; the State filed an answer and opposition, and Mr. Weston filed two traverses, one pro se and one with the assistance of counsel. The matter has been submitted without oral argument.

DISCUSSION

A. Double Jeopardy

The gist of Mr. Weston's double jeopardy claim is that the trial judge in the first trial declared a mistrial without prejudice based on prosecutorial misconduct, without Mr. Weston's consent. Mr. Weston contends that the second trial was barred by the double jeopardy clause because he did not consent to the mistrial and there was no "manifest necessity" that a mistrial be declared, especially since the prosecutor intentionally provoked the mistrial. The State counters with the argument that Mr. Weston did consent to the mistrial by defense counsel's two oral motions for a mistrial which preceded the judge's

declaration. In the alternative, the State contends that even if Mr. Weston had not consented to the mistrial, the mistrial was required by"manifest necessity," such that retrial was not barred.

1. **The Record**

On March 15, 1990, during Mr. Weston's first trial, the prosecution called two police officers to impeach the testimony of defense witnesses who testified as to Mr. Weston's actual residence. The trial court ruled that the prosecution would be limited to eliciting testimony from the officers regarding statements Mr. Weston made in their presence in April 1989 regarding his address. R.T. at 259-60, 369-70, 401-04.

Officer Miller was the first to testify. On direct examination, the prosecutor asked Officer Miller if he had arrested Mr. Weston in April 1989, and for what crime. When defense counsel objected, the judge ordered the question stricken and admonished the prosecutor for exceeding the scope of permissible testimony. R.T. at 416-17. At that point, defense counsel stated, "[f]or the record I object, ask for a mistrial." R.T. at 416. The judge responded, "I will take that under submission." Id. The next witness was

Officer Biden, who testified in part that Mr. Weston was out on parole at the time they spoke. R.T. at 421-23.

After the jury had been excused for the day, the judge and defense counsel discussed the matter further. Defense counsel stated, "I have a motion for a mistrial, your honor" and then proceeded to explain the basis for his motion -- that the prosecutor elicited prejudicial testimony in violation of the previous court ruling limiting the scope of the examination. R.T. at 424. The following colloquy ensued:

> MR. ADACHI [defense counsel]: In any event my position is that the court to declare [sic] a mistrial on its own motion due to --
>
> THE COURT: No, it is your motion, I don't make a motion. it is your motion, you want me to rule on your motion; is that clear?
>
> MR. ADACHI: Well, I am first asking the court to declare a mistrial.
>
> THE COURT: The court never declares a mistrial then [sic] you've got double jeopardy.

MR. ADACHI: That's right.

THE COURT: Well, I am not declaring any mistrial because I don't have -- don't try and trick courts into that.

* * *

THE COURT: I don't declare mistrials, you can make a motion for a mistrial, I may grant the motion. That I may do in which case there is no jeopardy attached. If I say it is a mistrial because of something that happens then it is double jeopardy, the defendant can't be charged. I think you know I don't intend to do that.

* * *

THE COURT: . . . All right, anyway you made a motion for mistrial, am I correct?

MR. ADACHI: Yes.

R.T. at 424-26. After discussing the motion with the prosecutor, the judge took the motion under submission and court was adjourned for the day. R.T. at 428.

The following morning, Mr. Weston filed a written motion and memorandum captioned "Motion for Mistrial Based on Prosecutorial Misconduct," in which he requested that the court declare a mistrial on the ground that the prosecutor's misconduct goaded the defense into seeking a motion for mistrial. C.T. at 127-32; R.T. at 429. The memorandum concluded,

> Accordingly, the defense requests that this court declare a mistrial in this matter based on prosecutorial misconduct, and hold that further retrial in this matter is barred by the Double Jeopardy Clause.
>
> If the court decided [sic] not to declare a mistrial in this motion sua sponte, the defense respectfully requests that the Court give the jurors the attached cautionary instructions.

C.T. at 132.

The judge, the prosecutor and defense counsel then discussed Mr. Weston's motion for a mistrial. The judge concluded that there had been no intentional prosecutorial misconduct, and stated that he was granting Mr. Weston's motion for a mistrial based on cumulative error attributable to himself, the prosecution and defense counsel. R.T. at 437-39. Defense counsel then attempted to delay a final ruling on the motion so that he could confer with Mr. Weston, on the ground that his motion was based on intentional prosecutorial misconduct, which would preclude retrial. R.T. at 439. The judge denied defense counsel's request, and concluded, "I am granting your motion. I am granting the motion you made for a mistrial, it was granted, this is your motion." Id. Defense counsel reiterated that his motion was based on intentional prosecutorial misconduct, and that therefore his motion was denied and the court's declaration was sua sponte. R.T. at 440. The judge then admonished defense counsel, "[o]h, no, counsel, you seem to forget yesterday when we adjourned . . . you made a motion for mistrial, I said I would take it under submission. I did take it under submission. And I granted the motion." Id.

2. **Consent**

Mr. Weston contends that his second trial violated the double jeopardy clause because the trial judge declared a mistrial without his consent. He argues that his defense counsel made it clear at all times that his motion for a mistrial was premised on intentional prosecutorial misconduct, and that it was sought only if granted with prejudice to retrial. Mr. Weston further argues that the judge's declaration of a mistrial without prejudice came as a shock to defense counsel, who repeatedly tried to explain that he intended only that the motion be granted if with prejudice. Thus, Mr. Weston concludes, he did not consent to the mistrial and his retrial violated the double jeopardy clause.

The State counters by arguing that Mr. Weston did consent to the mistrial. The State points out that the two oral motions were not made with the caveat that they be granted only if with prejudice -- only the subsequent written motion was so limited. The State also notes that even after the judge made it clear that if he granted the motion it would be without prejudice, Mr. Weston never formally sought to withdraw the motion, and the judge explicitly ruled on

the submitted oral motions. Thus, the State concludes, Mr. Weston is bound by his election to seek a mistrial unless he can show that either the court or the prosecutor goaded him into so moving.

The fifth amendment double jeopardy clause protects criminal defendants from successive prosecutions for the same offense, Oregon v. Kennedy, 456 U.S. 667, 671 (1982), and defendants are entitled to be tried to verdict by the first jury impaneled to try them. Wade v. Hunter, 336 U.S. 684, 689 (1949). "Central among the protections afforded by the double jeopardy clause is the assurance that 'the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error.'" U.S. v. Bates, 917 F.2d 388, 393 (9th Cir. 1990) (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)). However, these rights are not absolute, and must sometimes give way to society's interest in determining guilt or innocence. Wade, 336 U.S. at 689.

Whether a mistrial bars re-prosecution depends upon determination of whether the defendant consented to the mistrial and what led to that consent. Where a defendant consents to mistrial, either by affirmatively making the motion or consenting to a sua

sponte declaration, a second prosecution is barred only if the defendant can show that the prosecutor goaded the defense into that consent Kennedy, 456 U.S. at 675-76. If the defendant is found not to have consented, only a showing by the prosecution that "manifest necessity" required a mistrial will overcome the double jeopardy bar and allow for reprosecution. Arizona v. Washington, 434 U.S. 497,505 (1978).

The threshold issue in the instant action is whether Mr. Weston consented to the mistrial by moving for mistrial both orally and in writing. After careful review of the record, the court finds that Mr. Weston did not consent to the mistrial declared by the trial court judge.

There is no dispute that Mr. Weston, by his counsel, twice orally moved for a mistrial on march 15, 1990, premising those motions on prosecutorial misconduct and requesting that the judge grant them sua sponte. R.T. at 416-26. After explaining that he would not do so sua sponte, the judge took the motions under submission. R.T. at 424-28. The following morning, defense counsel filed a formal written motion for a mistrial, explicitly premised on prosecutorial misconduct and explicitly requesting a

ruling of once in jeopardy. C.T. at 127-132; R.T. at 429. Following discussion with counsel, the judge then declared a mistrial without prejudice, purportedly based not on Mr. Weston's written motion but on the previous oral motions taken under submission. R.T. at 437-39. Defense counsel attempted to object, explaining that he never intended to seek a mistrial without prejudice, but the judge insisted that the motion he was granting was the previous day's motion that was not explicitly limited to a mistrial with prejudice. R.T. at 439-40.

"Consent should not be assessed by the mechanical application of an absolute rule, but rather by an analysis informed by the weighty considerations inherent in criminal jeopardy." Glover v. McMackin, 950 F.2d 1236, 1240 (6th Cir. 1991); see also Lovinger v. Circuit Court, 845 F.2d 739, 744 (7th Cir. 1988) (consent to mistrial must be narrowly defined). Accordingly, a defendant's consent to mistrial must be meaningful, not based upon mere technicalities. It is clear from the record that Mr. Weston did not consent to the trial judge declaring a mistrial without prejudice -- defense counsel actively sought to persuade the judge that such a mistrial was not what he wanted, and

sought an opportunity to meet with his client before the ruling as well, all to no avail. The mere fact that Mr. Weston himself had moved for a mistrial does not in and of itself necessarily lead to the conclusion that he consented to the mistrial at the time and in the manner it was declare. See Lovinger, 845 F.2d at 743-44 (holding it improper to assume previously made mistrial motion made consent as to later motion based on different grounds); U.S. ex rel. Russo v. Superior Court of New Jersey, 483 F.2d 7, 17 (3d Cir.), cert. denied, 414 U.S. 1023 (1973) ("We see no reason to lock [defendant] into a [mistrial] motion once it is made.").[3]

"Consent should be implied only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order." Glover, 950 F.2d at 1240 (internal quotations and citations omitted). Based on the trial record, the court finds that Mr. Weston did not acquiesce in the mistrial order, notwithstanding the trial judge's comments to the contrary. Even assuming defense counsel's original oral motions did not sufficiently reflect his intent that the mistrial be declared with prejudice, his subsequent written motion certainly clarified that intent, and he

made numerous attempts to persuade the judge not to declare the mistrial without prejudice. These circumstances make it clear that Mr. Weston did not consent to the mistrial without prejudice. The trial judge either should have deemed the written motion to be a modification of the oral motion and ruled upon that modification, or he should have treated the earlier motion, made in the heat o f trial, as withdrawn when the written motion was filed and ruled on the substituted motion.[4]

Absent Mr. Weston's consent,retial was only permissible if there was a manifest necessity justifying the mistrial declaration.

3. **Manifest Necessity**

The State contends that even if Mr. Weston did not consent to the mistrial, double jeopardy nonetheless did not bar his retrial because the error committed at trial gave rise to a manifest necessity that a mistrial be declared. Mr. Weston responds that the State cannot and does not satisfy the high burden of proving that the mistrial was justified by manifest necessity.

Declaration of a mistrial without the defendant's consent bars retrial unless the prosecution

can show that the mistrial was required by manifest necessity, and the prosecution bears the burden of proving the existence of manifest necessity. Washington, 434 U.S. at 505. Manifest necessity exists only where "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by the continuation of the proceedings." United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion). While courts have found it impossible to articulate a concise definition of this nebulous standard, it is clear that "there are degrees of necessity, and only a 'high' degree can justify a mistrial." Bates, 917 F.2d at 394 (citing Washington, 434 U.S. 506).

While determination of whether this standard has been met must be made on a case by case basis, Lovinger, 845 F.2d at 745 (citing Illinois v. Somerville, 410 U.S. 458, 463 (1973)), the Ninth Circuit has recently articulated the proper analysis for a reviewing court. As a general rule, the trial judge's determination that a mistrial must be declared is entitled to some degree of deference. Bates, 917 F.2d at 934. However, {[t]he strictest scrutiny is applied to the [trial] court's determination where the accused

claims that the mistrial was intentionally caused by the prosecution." United States v. Jarvis, 792 F.2d 767, 769 (9th Cir.), cert. denied, 479 U.S. 852 (1986).

There are two possible ways of analyzing whether the trial judge erred, depending upon the state of the record. First, where the record reveals that there was "an error certain to result in reversal, . . . a trial court properly exercise[s] its discretion in declaring a mistrial," as manifest necessity is self-evident. Bates, 917 F.2d at 395. This determination is made by objective analysis of the record as it existed at trial, rather than on what the trial judge subjectively believed. Id. Second, where it is not "patently clear that reversal is certain," the reviewing court should look at several factors to determine whether the trial judge erred. Id. at 395-96. These factors can be boiled down to two fundamental inquiries: (1) did the trial judge allow the parties a meaningful opportunity to be heard ont he propriety of the mistrial, or did the judge abruptly declare the mistrial without considering the parties' input? and 92) did the trial judge consider alternatives to a mistrial and choose the alternative least harmful to the defendant and most protective of this rights? Id. at 396.

In the instant action, it is clear that there was no manifest necessity justifying the mistrial.[5] That the error provoking the mistrial -- the prosecutor's improper questioning of the police officers -- would not result in certain reversal is obvious. While the prosecutor did attempt to elicit the fact that Mr. Weston had previously been arrested, no mention was made of the nature of his arrest or whether he was convicted of a crime. Evidence of prior bad acts and convictions often is admissible at trial to prove elements of a case other than character or propensity. See, e.g. F.R.E. 404(b) (prior convictions/bad acts admissible to prove motive, opportunity, identity, etc.); F.R.E. 609(a)(1) (prior convictions admissible to impeach testimony if probity outweighs prejudice); see also Cal. Evid. Code § 1101(b) prior convictions/bad acts admissible to prove motive, opportunity, identity, etc); Cal. Evid. Code § 788 (prior convictions admissible to attack witness credibility). No one disputes that the prosecutor's questions were improper, or that they were prejudicial. However, curative instructions could have removed such prejudice, and it is possible that even absent such instructions the prosecutor's conduct could be deemed harmless error.

See Henry v. Estelle, 993 F.2d 1423, 1426 (9th Cir. 1993) (reversing state conviction on habeas, but noting that admission of improper testimony constitutes reversible error only where the admission fatally infected the trial and it is probable that a more favorable result for defendant would have resulted absent the error). Thus, the court finds that the error was not certain to result in dismissal. Accordingly, the court must examine the Bates factors to determine if the trial judge erred in declaring the mistrial.

a. **Opportunity to be Heard/Abruptness**

Citing Washington, 434 U.S. at 515-516 & n.34, the Ninth Circuit held in Bates "that trial courts are much more likely to have exercised sound discretion when they listen to the parties before declaring a mistrial and dismissing the parties." 917 F.2d at 396. Thus, reviewing courts should ensure that the judge gave both parties a full opportunity to express their positions on the necessity and propriety of a mistrial. Id.

In the instant action, it appears from the trial transcript that the trial judge did allow the parties some opportunity to be heard on the propriety of a mistrial. On march 15, 1990, after the jury had been

excused for the day, the judge engaged in a fairly extensive colloquy with defense counsel and the prosecutor before taking he matter under submission. R.T. at 424-428. The following day, the judge again discussed the mistrial motion with counsel after defense counsel submitted the written motion and memorandum. R.T. at 437-40. Thus, this is not a case where the judge abruptly and without warning granted a mistrial -- defense counsel had several opportunities to be heard before the judge finally declared the mistrial. Compare Bates, 917 F.2d at 397 (insufficient opportunity to be heard where judge declared mistrial abruptly and without allowing counsel to comment at all); and Lovinger, 845 F.2d at 746 (same); with Buljubasic, 808 F.2d at 1266 (sufficient opportunity to be heard where judge discussed mistrial with counsel for more than hour).

b. **Least Harmful Alternative/Protection of Defendant's Rights**

Citing Jorn, 400 U.S. at 487, the Ninth Circuit held in bates that trial courts must consider and correctly evaluate alternatives to declaring a mistrial, and choose the alternative least harmful to the defendant's rights. 917 F.2d at 396. Furthermore,

reviewing courts should ensure that, to the extent possible, trial courts afford defendants the right to "make their declaring about the course of the trial and what benefits them." Id. at 397. See also Lovinger, 845 F.2d at 745 ("The record must reflect that the trial court kept in the forefront the defendant's valued right of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.") (internal quotations and citations omitted).

In the instant action, there is no evidence in the record that the trial judge declared a mistrial to benefit Mr. Weston, or gave meaningful consideration to more appropriate alternatives. One alternative to mistrial -- issuing curative instructions to the jury -- was explicitly propounded by defense counsel in his written memorandum in support of a mistrial with prejudice. C.T. at 132. The trial judge appears to have given little consideration to this obvious alternative, despite the fact that defense counsel clearly thought this alternative sufficient to protect his client's rights. On this record, it is clear that the judge did not sufficiently weigh alternatives to declaring a mistrial, and made no

determination that a mistrial was the best means of protecting Mr. Weston's rights.[6]

c. **Conclusion**

Weighing these factors, the court finds that the trial judge did not sufficiently protect Mr. Weston's rights by declaring a mistrial, and that such a declaration was not justified by manifest necessity. While the judge did provide counsel the opportunity to be heard, his declaration of the mistrial evidenced no real concern for protecting Mr. Weston's rights, and he gave no meaningful consideration to less damaging alternatives. Accordingly, because Mr. Weston did not consent to the mistrial, and because it was not justified by manifest necessity, retrial of Mr. Weston was barred by the double jeopardy clause, and his petition for writ of habeas corpus must be granted.

B. **Denial of a Fair Trial**

Mr. Weston bases his habeas petition on the alternative ground that the trial judge at his second trial exhibited an extreme bias toward defense counsel that deprived him a fair trial. While the court's order granting Mr. Weston habeas relief on the basis of his double jeopardy claim disposes of this action, the court will address this second ground in order to ensure a

full and final resolution of this action in an expeditious manner.

Mr. Weston alleges that on numerous occasions during his second trial, the trial judge commented on defense counsel in such a way as to deprive Mr. Weston of a fair trial. In particular, Mr. Weston alleges that the trial judge twice called defense counsel a liar in front of the jury, and during the prosecutor's closing argument refused to admonish the prosecutor when he characterized defense counsel as a lawyer who twists the facts. In response, the State concedes that these comments were improper, but argue that they were not so prejudicial as to deprive Mr. Weston of a fair trial.

1. **The Record**

While Mr.Weston alleges that throughout his second trial the judge treated defense counsel in a manner that made it clear that he held defense counsel in low regard, Mr. Weston highlights four particularly egregious examples to support his petition.

The first incident occurred during defense counsel's recross of a bartender regarding a conversation that the bartender testified to on redirect that allegedly took place in the bar. Defense counsel

attempted to impeach the credibility of the bartender's recollection by questioning whether he had conversations with many patrons. R.T. at 624. The trial judge admonished defense counsel that he would not permit such questioning, and noted that he'd never met a bartender who did not talk to patrons. Id. After commenting that he thought it was properly within the scope, defense counsel continued the line of questioning, asking the bartender "Assuming that facts that you did have conversations with the people there, do you remember the content of each and every one of those conversations?" R.T. at 625. The prosecutor commented "that is absurd," and the judge said "that is argumentative, that is not proper response on the redirect [sic], counsel, don't mislead this court." Id.

The second incident occurred when defense counsel attempted to impeach a witness' credibility with a prior inconsistent statement. R.T. at 806. When defense counsel attempted to read aloud a portion of her prior testimony, the trial judge, without any objection from the prosecution, admonished defense counsel "oh no, let's not take anything out of context," and made counsel begin reading from further back in the transcript. Id. Once defense counsel

began reading the transcript,the judge, again without objection from the prosecution, insisted "no, no, let's read it correctly," despite the fact that counsel apparently was reading verbatim. R.T. at 807-08.

The third incident occurred during defense counsel's questioning of Joan Madden, a police dispatcher, about her receipt of a 911 call in reference to the rape of Ms. Audrey E. At the first trial, Officer Madden testified that she took a 911 phone call concerning Audrey E., but not from Audrey E. herself. R.T. at 359-61, 365. During the second trial, defense counsel attempted to elicit the same information, but the prosecution objected. R.T. at 863. An unrecorded side bar ensued, after which defense counsel again tried to elicit that testimony. R.T. at 864. When officer Madden testified that she had received no such calls from Audrey E., the judge quickly admonished defense counsel in the jury's presence: "Counsel, you just told me at the side bar that there was one at 1:30. I'm sure you don't want to misrepresent to me . . . . Now you are telling me, this witness has now testified just the opposite." Id. Defense counsel then continued the general line of questioning. After

another objection by the prosecution, the following colloquy ensued:

> THE COURT: Counsel, you have lied previously to the court about what this witness was going to testify at the side bar. Unfortunately there is no record of it . . . .
>
> MR. ADACHI: Are you calling me a liar in front of the jury?
>
> THE COURT: Counsel, you are the one who just represented tome this witness here at 1:30 in the afternoon of April 1st received a 911 call. She just testified she did not. Your representations to the court was [sic] false.

R.T. at 868. Defense counsel proceeded to explain that it was the judge who misunderstood -- Officer Madden testified that she did not receive a call from Audrey E.; he had told the judge, and the witness would testify, that she had received a call concerning Audrey E. Id. Later, after the jury had been excused

for the day, defense counsel moved for a mistrial, which the judge refused, and the judge erroneously claimed that it was defense counsel who first used the word "lying." R.T. at 901-03.

The fourth incident occurred during the prosecutor's closing argument. The prosecutor told the jury:

> Mr. Adachi [defense counsel] talked about I didn't do this and I didn't do that. I had all this time. It is rally easy for a very, very clever person, ladies and gentlemen, to sit down and, you know, to take facts and make them say whatever he wants them to say. It is like people taking statistics, you can make statistics say whatever you want. And a clever lawyer like Mr. Adachi is can take facts, twist them a little bit, misstate them a little bit and try and sell you a bill of goods.

R.T. at 1062-63. Defense counsel objected, and the judge let the prosecutor continue, stating simply "I am not commenting, go ahead, you may continue with your argument." R.T. at 1063.

2. **Discussion**

Mr. Weston contends that these incidents, taken together, evidence a judicial bias against defense counsel and Mr. Weston that prevented Mr. Weston from receiving a fair trial. The State concedes that some of these remarks may have been improper, but argue that they did not render Mr. Weston's trial fundamentally unfair and accordingly do not warrant reversal of his conviction.

A criminal defendant has a due process right to a fair trial by an impartial tribunal, In re Murchison, 349 U.S. 133, 136 (1955), and the trial judge must be neutral, detached, and free from actual bias. Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972). However, federal habeas review of the fairness of a state trial court proceeding is narrow ins cope, and the trial judge's misconduct must be "significantly adverse to the defendant before it violate[s] the constitutional requirement of due process and warranted federal intervention." Garcia v. Warden, 795 F.2d 5, 7-8 (2d Cir. 1986); See also Dave v. Attorney General of N.Y., 712 F.2d 1566, 1571-72 (2d Cir. 1983), cert. denied, 464 U.S. 1048 (1984).

Keeping these standards in mind, the court is convinced that the trial judge's behavior, as evidenced by the four incidents set out above, so discredited defense counsel in the eyes of the jury that he was not capable of serving as an effective advocate for his client. The record reveals that the trial judge called defense counsel a liar in front of the jury on two occasions, chastised him for misleading the court or the jury on several more, and allowed to pass without comment the prosecutor's accusation in front of the jury that defense counsel twisted the facts of the case. The most egregious of these incidents was the one involving the testimony of officer Madden. In his remonstrations with defense counsel, the trial judge explicitly called defense counsel a liar in front of the jury. This colloquy alone was sufficient to interfere with Mr. Weston's right to a fair trial. While the other incidents were less egregious, their cumulative effect along with the officer Madden incident substantially tainted the record before the jury.

Regardless of the propriety of defense counsel's behavior, the trial judge was not justified in castigating him in front of the jury. See United States v. Spears,558 F.2d 1296, 1297 (7th Cir. 1977) (despite

defense counsel's improper behavior,judge's castigation in front of jury rose to leave of due process violation). By his actions, the trial judge made defense counsel an ineffective advocate and left the jury with the impression that defense counsel could not be believed. Under such circumstances, a fair trial and fair verdict were not possible.

Accordingly, even if Mr. Weston's second trial was not barred by double jeopard, as the court believes it was, it is clear that his conviction at the second trial cannot stand, due to the trial judge's conduct which rendered the trial fundamentally unfair.

CONCLUSION

Having been put once in jeopardy at his first trial, Mr. Weston could not constitutionally have been retried; his conviction at his second trial must be overturned, and no retrial on these charges may be held.

The court takes no joy in this order, and Mr. Weston should not consider this outcome a vindication of his repulsive conduct. Careful review of the trial record has persuaded this court that Mr. Weston is likely guilty of the reprehensible crime for which he was charged. This court's order is based solely on the

fact that the trial court's mistrial declaration violated fundamental constitutional rights -- rights inherent in our system of justice to which all citizens, regardless of culpability, are entitled. It is those rights, and only those rights, that this court vindicates today. If nothing else, this order should stand as yet another reminder to judges and prosecutors alike that in their zeal to punish the guilty, they must not trample upon the fundamental rights that from the foundation of our system of justice.

For the foregoing reasons, the court hereby GRANTS petitioner's request for writ of habeas corpus. Petitioner's conviction must be REVERSED, and the State of California shall release Mr. Weston from custody.

IT IS SO ORDERED.

Dated: Feb. 9, 1994

MARILYN HALL PATEL
United Sates District Judge

APPENDIX C

First Appellate District, Division One, No. AO50122
SO24798

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

IN BANK

THE PEOPLE, Respondent

v.

THEODORE ANTHONY WESTON, Appellant

Appellant's petition for review DENIED.

Mosk, J. is of the opinion the petition should be ' granted.

Chief Justice

APPENDIX D

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. THEODORE ANTHONY WESTON, Defendant and Appellant.	)	A050122

Defendant was charged with three counts of forcible oral copulation and one count of robbery, all committed against a single victim. The information also alleged certain enhancing circumstances: kidnapping for the purpose of sexual assault, a prior conviction for forcible oral copulation, and two prior prison terms. The jury found defendant guilty of one count of forcible oral copulation,but was unable to reach a verdict on the remaining charges or on the

kidnapping allegations. Those charges and allegations were ultimately dismissed. The trial court found the prior prison term allegation to be true and sentenced defendant to prison for eleven years: the middle term of six years plus five years for the prior prison term. Defendant appeals.

FACTS

Outside the Bar

On the night of March 31, 1989, the victim, Audrey E., went to Sergio's bar located on 19th Avenue in San Francisco. During the course of the evening she chatted with Bob Vieira, a friend with whom she worked. At the end of the evening, at approximately 2 a.m., Ms. E. left Sergio's and headed toward her car parked nearby. She was driving a Dodge van that belonged to another friend, Sam Sylvester.

Ms. E. noticed a group of three or four black men standing near a parked limousine belonging to Bob Vieira, who is white. One of the men was defendant, who was a stranger to Ms. E. he had a bottle in his hand and was engaged in a heated confrontation with Mr. Vieira. Ms. E. tried to cool

things down by telling defendant that Vieira was a "nice guy" and "okay."

Defendant hit Vieira's car with the bottle he was holding. Audrey put her arm on defendant's shoulder and tried to lead him away. Vieira eventually got in his car and left.

Audrey E. then started walking toward her van. Defendant followed and insisted on driving her home because she was too drunk to drive. Ms. E. told him she was going to drive herself. When they got to the van, Ms. E. climbed into the driver's seat, but defendant blocked the door so she could not close it. He shoved her into the passenger's seat and climbed into the van.[4/] The bartender from Sergio's witnessed this abduction and heard Ms. E. screaming. He tried unsuccessfully to follow the van in his own car.

Inside the Van

Defendant drove for about ten minutes, along the way slapping Audrey E. across the back of the

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4. Another witness, Donald Montgomery, testified that Audrey E. gave defendant the keys so he could drive her home. Mr. Montgomery got in the van, too, just to satisfy his curiosity. After defendant had driven for a few minutes, Montgomery sensed a romance developing and asked to be driven back to his car.

head several times. Ms. E. started to cry. Defendant drove the van over a curb and stopped in an open field. Ms. E. grabbed the door handle, but defendant said, "[Go] ahead bitch I will splatter your brains all over this van, just try it." Defendant called her a "honky lover" and told her he was going to give her the "ass whooping" he had intended for Bob Vieira. He then demanded money, and she gave him the $60-80 she had in her purse.

Defendant told Audrey E. to lift up her blouse. As she did so, her bra came up too, leaving her breasts exposed. Defendant slapped them and then forced Ms. E's head onto his lap. He ordered her to such his penis. When she refused, he repeated his demand, and she complied.

Defendant then took out a metal container of powder, arranged the powder into lines, struck a straw in Ms. E.'s nostril and over her protests forced her to inhale a line.

He then got out of the van and walked around to the passenger's door. He opened the door and ordered Ms. E. to take down her pants and lie on the seat. He then sprinkled powder from the metal container onto her breasts, stomach and vagina.

Defendant licked the powder off Ms. E.'s body. He then had intercourse with her.

When he had finished, defendant returned to the driver's seat, put some powder from the metal container on his penis and forced Ms. E.to orally copulate him. When he ejaculated into her mouth, she spit the semen onto his lap, and defendant slapped her on the head.

Defendant told Audrey E. he was going to be her pimp and she would be his whore. He made arrangements to meet her the next day and wrote his phone number and the name "T. Bear" or "Teddy Bear" on a piece of paper.[5] (A few days later, Ms. E. talked to the bartender at Sergio's to see if he knew anyone named "T. Bear."

Defendant drove the van to a 7-11 store to get something to drink. After he parked the van, however, he could not get the keys out of the ignition. ms.E.told him not to worry and asked him to buy her some cigarettes. Once defendant went into the store, Ms. E. locked the doors, jumped into the driver's seat and drove off. As she backed out of the parking

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5. Audrey E. testified she gave the paper to police, but the investigating officer had no recollection or record of receiving it.

place, defendant ran out of the store, banged on the window and demanded his jacket. Ms. E. drove away.

Calls for Help

Audrey E. drove to her home in South San Francisco and phone 911. The operator told her she would have to call the Ingleside Station in San Francisco because the rape occurred in San Francisco's jurisdiction.[6/] When Ms. E. telephoned the Ingleside station she was told she would have to come to the station to make a report.

Ms. E. was too frightened to leave her house. Instead, she called Bob Vieira, but she got only his answering machine. Then she called Sam Sylvester, who was a t work at the airport. Sylvester convinced her to drive to the airport to meet him. When she arrived, he got in the van and drove to an airport parking lot. Audrey E. slept in the back of the van for several hours.

When Ms. E. woke up, Mr. Sylvester drove her to San Francisco General Hospital, where she was examined by medical personnel and eventually

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6. The tapes of calls on April 1, 1989, were unavailable, but computer records showed two calls from Audrey E.'s number made to the South San Francisco police at 4:44 and 4:45 a.m.

interviewed by police. Ms. E. was visibly upset; her clothes were disheveled and soiled; and she had a fractured ankle. Defendant's jacket was in the back of the van.

Defense

Defendant did not testify. Through other witnesses, defendant presented the defense of consent.

Portia Peguese testified that in the early morning hours of April 1, 1989, she was watching television at the home of her friend, Debra Guillory, on Victoria Street in San Francisco. About 1:30 a.m. defendant came into the apartment accompanied by Audrey E., who seemed "pretty drunk." Ms. E. made herself a drink and then walked into one of the back bedrooms with defendant. About an hour later, defendant came out of the bedroom with money in his hand and said he was going to make a run. Ms. Peguese assumed he was going to buy drugs. Half an hour later, Ms. E. came out of the bedroom and complained that defendant had her money and had not yet come back. Ms. E. went back to the bedroom and emerged an hour later. At that point, Debra Guillory told Ms. E. she did not think defendant was coming back, so Ms. E. left.

DISCUSSION

I. Double Jeopardy

Two trials were held in this case. The first trial resulted in a mistrial after improper evidence was elicited by the prosecutor during the rebuttal phase. Defendant then moved to enter a plea of once in jeopardy and to dismiss the information on grounds of double jeopardy ont he ground that he had not consented to the mistrial. The motion was denied. On appeal, defendant reiterates his contention that the second trial was barred because he did not consent to the mistrial.

The governing principle is this: "Once jeopardy has attached, discharge of the jury without a verdict is tantamount to an acquittal and prevents a retrial, unless the defendant consented to the discharge or legal necessity required it." (Stone v. Superior Court (1982) 31 Cal.3d 503, 516; see also Larios v. Superior Court (1979) 24 Cal.3d 324, 329; People v. Rojas (1975) 15 Cal.3d 540, 545.) The sole issue presented here is whether defendant consented to the mistrial.[7/] Ordinarily, a defendant's motion for

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7. The second ground for permitting retrial, legal necessity, is not applicable here. "In California, legal necessity for a mistrial

mistrial is considered a sufficient indication of consent to preclude a later claim of double jeopardy. (People v. Hatchcock (1973) 8 Cal.3d 599, 613, overruled on other grounds in People v. Green (1980) 27 Cal.3d 1, 33.) However, consent will not be implied if defense counsel attempts to withdraw the request for a mistrial. (Cardenas v. Superior Court (1961) 56 Cal.2d 273.)

In the present case, defendant twice asked orally for a mistrial. The first request came after the prosecutor, during rebuttal, elicited from a police officer witness information about defendant's arrest for check fraud. The trial court had previously limited rebuttal testimony to statements made by defendant in April 1989 concerning his home address to rebut the defense testimony that defendant was living with Debra Guillory until his arrest. Defense counsel objected to the police officer's testimony and asked for a mistrial: "For the record I object, ask for mistrial." The trial court took the matter under submission.

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typically arises from an inability of the jury to agree [citations] or from physical causes beyond the control of the court [citations], such as the death, illness, or absence of judge or juror [citations] or of the defendant [citations]. A mere error of law or procedure, however, does not constitute legal necessity." (Curry v. Superior Court (1970) 2 Cal.3d 707, 713-714; see also Larios v. Superior Court, supra, 24 Cal.3d at pp. 330-333.)

The second request came after the prosecutor asked its next rebuttal witness, a parole officer, whether he knew defendant. When the jury was excused for the day, defense counsel stated, "I have a motion for mistrial, your Honor." After further argument on the propriety of the rebuttal testimony, defense counsel asked the trial court "to declare a mistrial on its own motion . . . ." The trial court declined to do so.

After further discussion, in which defense counsel reiterated his request that the trial court act "on its own motion" and the trial court refused, the trial court concluded by saying, "All right, anyway you made a motion for mistrial, am I correct?" Defense counsel replied, "Yes." The court then took the matter under submission.

The next morning defendant filed a written "Motion for Mistrial Based on Prosecutorial Misconduct." In that motion defendant asked the court to declare a mistrial ont he ground that the prosecutor "by his misconduct, goaded the defense into seeking the instant motion for mistrial." The motion concluded: "Accordingly, the defense requests that this court declare a mistrial in this matter based on

prosecutorial misconduct, and hold that a further retrial in this matter is barred by the Double Jeopardy Clause. [¶] If the court decided not to declare a mistrial in this matter sua sponte, the defense respectfully requests that the Court give the jurors the attached cautionary instructions."

The trial court heard argument on the mistrial motions and ruled as follows. First, the court found that the prosecutor had not goaded the defense. Next, the court found that the rebuttal evidence was improper and prejudicial to defendant. Accordingly, the court granted the motion for mistrial.

Defense counsel thereupon protested that his motion had been based on prosecutorial misconduct and since the trial court had ruled against him on that point defense counsel wanted to talk to his client on whether or not to proceed with the trial. The following discussion ensued:

"THE COURT: . . . I am granting your motion. I am granting the motion you made for a mistrial, it was granted, this was your motion.

"MR. ADACHI: I understand that.

"THE COURT: I read the cases.

"MR. ADACHI: But the grounds that I made the motion were denied by the court.

"THE COURT: Oh, no, counsel, you seem to forget yesterday when we adjourned at 4:30 or 4:20 you made a motion for mistrial, I said I would take it under submission. I did take it under submission. And I granted the motion.

"MR. ADACHI: I made a mistrial only on one ground, your Honor.

"THE COURT: Counsel, it was your motion last night. I made it crystal clear because you tried to lay the onus on the court. If you want to have the record read back --

"In any event sit down now and be quiet, you will sit down and be quiet, Mr. Adachi. This court has no further jurisdiction over this case."

In this appeal, defendant asserts that he did not consent to the mistrial because his requests were requests for mistrial with prejudice. This assertion is not convincing. Defendant's written motion was based on the principle that when governmental misconduct was intended to goad the defendant into moving for a mistrial, the defendant's motion does not preclude him from raising the bar of double jeopardy. (Oregon v.

Kennedy (1982) 456 U.S. 667, 676.) The trial court, however, rejected defendant's claim that the prosecutor had goaded defense counsel. Even if defendant's oral requests made at the close of the previous day were solely intended to have the trial court declare a mistrial sua sponte, the trial court expressly declined to do so. After that ruling, defendant continued to urge a mistrial and presented oral arguments asserting that he was prejudiced by the evidence of his parole status and forgery arrest. In granting the motion for mistrial, the court made clear that the motion was defendant's, not the court's. At no time did defendant seek to withdraw his motion. We conclude that the record adequately supports a finding that defendant by his requests for mistrial consented to the discharge of the jury.[8/] Hence, the second trial was not barred.

II. Trial Court's Comments

A. Maligning Defense Counsel

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8. People v. Compton (1971) 6 Cal.3d 55, 62, and People v. Chaney (1988) 202 Cal.App.3d 1109, 1115-1117, upon which defendant relies, are distinguishable in that in each case the court on its own declared a mistrial; defense counsel made no request for one. The principle enunciated therein that consent will not be inferred from silence has no application here, where defense counsel affirmatively requested a mistrial.

Defendant contends the trial court committed prejudicial misconduct by maligning defense counsel in four instances. We find no reversible error.

1. Misleading the Court

During redirect examination of the bartender from Sergio's, the prosecutor established that the witness remembered a statement made by Audrey E. in the bar. On recross, defense counsel challenged the witness's ability to recall the details of his conversation with Audrey E. and asked if he remembered the content of each and every conversation he had with patrons in the bar.[9/] The prosecutor commented, "That is absurd."

The trial court ruled: "That is argumentative, that is not proper response on the redirect, counsel, don't mislead this court." Defense counsel protested, "I believe that it was within --," but the trial court cut him off: "Well, okay, I don't."

2. Distorting Prior Testimony

On cross-examination of Audrey E., defense counsel attempted to impeach the witness with a prior

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9. At first defense counsel asked the bartender if he had many conversations with patrons. The trial court challenged the propriety of such impeachment and defense counsel replied, "I think this is within the redirect that was asked."

inconsistent statement taken from the preliminary hearing transcript. Although there was no objection from the prosecutor, the trial court admonished defense counsel, ". . . Let's not take anything out of context." As counsel read the prior testimony the court said, "No, no, let's read it correctly."[10/]

3. **Lying to the Court**

At the first trial, Joan Madden, a dispatcher for the San Francisco police department, testified for the defense and reported that she had searched the records and found no calls from Audrey E. to 911, but she had found one call concerning Audrey E. made by a police officer from San Francisco General Hospital at 1:28 p.m. on April 1, 1989. Ms. Madden also testified that pursuant to the policy of the department, the Ingleside Station would have been required to dispatch help to Ms. E. had she called and reported a rape, as she claimed to have done.

At the second trial, the prosecutor objected to defense counsel's question concerning Ms. Madden's search for calls from Audrey E. Defense counsel then

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10. The transcript reads, "As far as remember [sic] I hit my ankle . . . . " Counsel had read it as follows before the trial court interrupted: "As far as I remember--."

stated that he was seeking to bring out that a call was made concerning Audrey E. from the hospital. An unreported bench conference followed.[11]

Defense counsel then asked the witness, "[D]id you check the records . . . [for] phone calls made to 911 on April 1, 1989 concerning an Audrey [E.]?" The witness replied, "Yes . . . I found no calls from her." (Emphasis added.)

The trial court interjected: "Counsel, you just told me at the side bar there was one at 1:30. I'm sure you don't want to misrepresent tome. I permitted the questioning because that is what I asked you at the side bar. You said there was a 911 call made at 1:30, I said well that may have some relevance. Now you are telling me, this witness has now testified just the opposite."[12]

Defense counsel then attempted to ask Ms. Madden about the San Francisco dispatch policy. When the prosecutor objected, defense counsel

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11. Later, defense counsel explained on the record that he had stated he was trying to elicit information about the call from the hospital. The prosecutor and the trial court thought defense counsel had said Ms. Madden was going to testify about a call directly from Audrey E.

12. Later, counsel was able to elicit the information about the 911 call concerning Audrey E. made from the hospital.

reminded the court that the evidence had been ruled admissible at the first trial. The trial court responded as follows:

"THE COURT: Counsel, you have lied previously to the court about what this witness was going to testify to at the side bar. Unfortunately there is no record of it. Mr. Cling heard it, now you are telling me that I did in the last trial. That is because a proper foundation laid here, or it may be because nobody objected.

"MR. ADACHI: Are you calling call me a liar in front of the jury?

"THE COURT: Counsel, you are the one who just represented to me this witness here at 1:30 in the afternoon of April 1st received a 911 call. She just testified she did not. Your representations to the court was false."[13/]

At the end of the day and outside the presence of the jury, defense counsel moved for a mistrial. The trial court replied:

"THE COURT: You asked for it, are you calling me a liar you said, I replied yes because you

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13. Defense counsel eventually called another witness to testify about the dispatch policy. The prosecutor waived objection.

did lie to the court. . . . All right, the record is clear. You asked me if I was calling you a liar and I said yes."

4. No Comment on Prosecutor's Remarks

In his closing argument the prosecutor suggested defense counsel misstated the facts: "You know, it is real easy. Mr. Adachi talked about I didn't do this and I didn't do that. I had all this time. It is real easy for a very, very clever person, ladies and gentlemen, to sit down and, you know, t take facts and make them say whatever he wants them to say. It is like people taking statistics, you can make statistics say what ever you want. And a clever lawyer like Mr. Adachi is can take facts, twist them a little bit,misstate them a little bit and try and sell you a bill of goods."[14/] Defense counsel objected to "that inference as an officer of the court. We cannot engage in perjury." The trial court replied, "I am not

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14. The argument seems to have been a response to defense counsel's statements that although the prosecutor learned the defense theory at the first trial, he never introduced evidence to prove Portia Peguese was lying.

commenting, go ahead, you may continue with your argument."

With respect to the first two instances, we think the remarks were so mild that they did not constitute judicial misconduct. The court said nothing that deprived defendant of a fair trial.

The Attorney General correctly acknowledges that the third instance (accusing defense counsel of lying) constituted misconduct. The remark was inappropriate.

The Attorney General argues that the fourth instance was not misconduct because the trial court's failure to sustain defense counsel's objection to the prosecutor's remarks "cannot fairly be read as an endorsement of those remarks." We cannot agree. The court's remark, "I am not commenting" is susceptible to the interpretation that the court agreed with the prosecutor but felt constrained to keep silent on the record.

Despite these errors, we decline to reverse. One or two disparaging remarks toward counsel do not compel reversal. What is required is a "pattern of judicial hostility." (People v. Fatone (1985) 165 Cal.App.3d 1164, 1175, citing Cal. Criminal Law

Practice Series, Prosecutorial and Judicial Misconduct (Cont.Ed.Bar 1979) § 2.5, p. 78.) Here, although the trial court's rebukes of counsel may have been improper, we do not find a pattern of judicial hostility on this record. Further, we note that the jury was instructed to disregard the remarks.[15] We do not think they deprived defendant of a fair trial.

B. **Comments on the Evidence**

Defendant contends the trial court made two improper comments on the evidence. We have reviewed the comments and find them completely harmless.

Despite the first challenged remark ("Look, I don't think it makes the slightest bit of difference, let him read it, it will be faster that way"), defense counsel was permitted to read Ms. E's prior testimony. Nor does any error appear in the second remark during the

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15. The jury was instructed pursuant to CALJIC No. 17.30, which provides: "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." Moreover, the trial court added its own admonition: "Furthermore I might add there was exchange of colloquy here, and I commented about one of the attorneys here. You are not in any way to have that influence you in your reaching a verdict in this case."

court's independent questioning of the defense witness ("It is . . . written in the state constitution the court has an obligation to search for the truth"). The trial judge has statutory authority to control the proceedings "with a view to . . . effective ascertainment of the truth . . . ." (Pen. Code, § 1044; Evid. Code, § 765.) Accordingly, a trial judge may ask questions on his own. (People v. Melton (1988) 206 Cal.App.3d 580, 595; People v. Pierce (1970) 11 Cal.App.3d 313, 321-322.) The court's remark did not necessarily indicate the court was aligned with the prosecution.

Finally, any errors in the evidentiary rulings concerning prior inconsistent statements by Sam Sylvester were of no consequence. Defendant succeeded in getting before the jury the testimony of Princes Sylvester (1) that Audrey E. was romantically involved with Sam Sylvester at the time and (2) that Mrs.Sylvester did not notice the broken arm rest until several weeks after the incident, even though she was the primary driver.

III. Rebuttal Testimony

Nor do we find any error in the rebuttal testimony regarding defendant's home address. As the Attorney General points out, the direct testimony of

Portia Peguese permitted the inference that defendant lived in Debra Guillory's apartment. According to her testimony, defendant arrived at the apartment at approximately 1:30 a.m., accompanied by Audrey E. He introduced Ms. E. to Debra Guillory and Portia Peguese and then went into one of the bedrooms, where the couple remained for about an hour. When defendant left the apartment he told Debra Guillory he would be "right back." Defendant's conduct, as described by Ms. Peguese, strongly suggested he treated the apartment as his home. The prosecution was entitled to rebut such evidence presented in defendant's case.

In any event, the rebuttal testimony was not prejudicial. Where defendant actually resided was not significant to the issues at trial. Defendant contends the testimony was harmful because defendant gave different addresses to each rebuttal witness and the jury may have concluded that defendant had something to hide or that he was an opportunistic liar. But the inconsistency in the addresses was explained by the employee of the check-cashing service: the address defendant gave the police officer was listed in the records of the check-cashing service as the address of

defendant's mother. Any error in admitting the rebuttal testimony was inconsequential and does not require reversal.

IV. Unanimity Instruction

Defendant was charged with three counts of forcible oral copulation. Audrey E. testified to three acts of oral copulation inside the van. The jurors convicted defendant of one count but were unable to agree on the others. Defendant contends the jurors may not have understood that each count corresponded to a specific act and that in order to convict, all jurors had to agree that the same act had occurred. Defendant asserts that the trial court should have given the unanimity instruction (CALJIC No. 17.01) sua sponte. We disagree.

A unanimity instruction is required only if the evidence indicates the jurors might disagree as to the particular acts the defendant committed and yet convict him -- e.g. where the number of acts testified to exceeds the number of offenses charged, or where the defense could be accepted or rejected as to some but not all acts. (People v. Jones (1990) 51 Cal.3d 294, 321-322; People v. Gonzalez (1983) 141 Cal.App.3d 786, 791, accord, People v. Schultz (1987)

192 Cal.App.3d 535, 539.) In the present case, there was no danger that different jurors might rely upon different acts. The information charged three acts, and the victim testified to three.[16/] The defense applied equally to all three charges.

The jurors were instructed pursuant to CALJIC No. 17.02 that each count charged a distinct crime and that they had to decide each count separately.[17/] This instruction alerted the jurors to their duty to reach a separate verdict on each count. Moreover, during their deliberations, the trial court supplemented that instruction in response to jurors' questions concerning unanimity. First, the jurors asked, "[M]ust all verdicts be reached unanimously?" The court replied: "One or more must be arrived at unanimously. Before you can return a verdict it must be unanimous. Not to all verdicts or to any one of them. . . ." Later, the jurors submitted the following:

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16. The fact that the jurors actually convicted defendant of less than three counts does not mean the jurors disagreed as to particular acts. Nor does it mean that the jurors were less than unanimous on the one count for which they did return a verdict.

17. The instruction as given reads as follows: "Each count charges a distinct offense. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the offenses charged. Your finding as to each count must be stated in a separate verdict."

"The jury is still somewhat confused as to the need for unanimity in our votes ont he four counts and three 'sub-counts' of kidnapping . . . . Must only one of the four be unanimous or must each individual count be unanimous?" When the jurors returned to the courtroom, a juror asked, "[T]o have a verdict one way or another on each count you have to be unanimous?" The court replied: "Yes, for there to be a verdict all 12 of you must agree. But you may reach a verdict as to count 1 and be hung up on counts 2, 3, 4. You may reach a verdict as to 3 counts and not, be hung up on count 4. You may find the defendant guilty of one count and not guilty of another, that is strictly up to you." We conclude the jury was adequately instructed.

V. Belief in Consent

The jury was instructed on consent as a defense to the charge of forcible oral copulation. Defendant contends the trial court should have further instructed the jury sua sponte pursuant to CALJIC No. 10.65 and People v. Mayberry (1975) 15 Cal.3d 143, 156, that defendant could not be convicted of forcible

oral copulation if he had a reasonable and good faith belief that the victim consented to the act.[18/]

There is a split of authority on when a Mayberry instruction need be given sua sponte. Some courts have held that the Mayberry defense is implicit in a defense of actual consent and must be given whenever that defense is tendered. (People v. Hampton (1981) 118 Cal.App.3d 324, 329-330; see People v. Anderson (1983) 144 Cal.App.3d 55, 61-62.) More recent cases have held that the defense of actual consent does not necessarily raise the Mayberry defense. (People v. May (1989) 213 Cal.App.3d 118, 125; People v. Rhoades (1987) 193 Cal.App.3d 1362, 1368-1369; People v. Burnham (1986) 176 Cal.App.3d 1134, 1147; People v. Romero (1985) 171 Cal.App.3d 1149, 1156.) Under this latter line of cases, an instruction need be given only where there is substantial evidence the defendant may have reasonably though mistakenly believed the victim was consenting. (People v. Rhoades, supra, 193 Cal.App.3d at pp. 1367, 1369; People v. Burnham, supra, 176

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18. The trial court did instruct the jury on the Mayberry defense sua sponte with respect the kidnapping allegations.

Cal.App.3d at pp. 1146-1148; People v. Romero, supra, 171 Cal.App.3d at p. 1156.)[19/]

In the present case, the evidence was insufficient to support a Mayberry defense to the charges of forcible oral copulation. The jury heard two opposing versions of the events. The defense theory, supported by the testimony of Donald Montgomery and Portia Peguese, was that Audrey E. willingly allowed defendant to drive her from Sergio's to Debra Guillory's house, where she voluntarily joined defendant in the bedroom. There was nothing in this testimony to support a finding that defendant was mistaken, i.e., that Ms. E. did not consent. Ms. E. described a forcible sexual attack inside the van during which defendant beat and threatened her. There was nothing in her testimony to support a finding that defendant reasonably believed Ms. E. was a consenting participant. Neither version of the events contains any suggestion that defendant mistakenly but reasonably

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19. The Supreme Court has recently granted review in two cases which raise the question whether a Mayberry instruction must be given sua sponte. (People v. Vasquez, S021871, review granted Aug. 22, 1991; People v. Williams, S022660, review granted Oct. 3, 1991.)

believed Ms. E. consented to the oral copulation. The trial court was not required to instruct sua sponte.

The judgment is affirmed.

Dossee, J.

We concur:

Newsom, Acting P.J.

Stein, J.

People v. Weston, A050122

APPENDIX E

FILED: April 12, 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THEODORE A. WESTON,	) No. 94-15391
Petitioner-Appellee,	) D.C. CV-92-4190 MHP
v.	) ORDER
PEG KERNAN, Warden,	)
Respondent-Appellant.	)

Before: WALLACE, Chief Judge, PREGERSON and BEEZER, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and all members have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active serve has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

1. Except as otherwise indicated, all information in this section is drawn from the State Court Clerk's Transcript, attached as Respondent's Exhibit K, and the State Court Reporter's Transcript, attached as Respondent's Exhibit L. Citation to the Clerk's Transcript will be in the form "C.T. at #"; citation to the Reporter's Transcript will be in the form "R.T. at #".

2. The actions alleged in the information occurred on the night of March 31, 1989. The specific facts of the crime need not be recounted for purposes of this action.

3. United States v. Buljubasic, 808 F.2d 1260, 1265-66 (7th Cir.), cert. denied, 484 U.S.815 (1987), teaches no differently. In Buljubasic, the defendant made mistrial motions "too many times to count," and neither complained nor objected when the court ultimately declared a mistrial. Id. By contrast, in the instant action Mr. Weston moved for mistrial with prejudice twice, and when the judge indicated he would declare a mistrial without prejudice, Mr. Weston's counsel did object and attempt to dissuade the judge.

4. The court recognizes that it may be the case that defense counsel purposefully created a chaotic situation as to the status of the motions in order to achieve some tactical advantage. Nonetheless, it was the duty of the trial judge to clarify the record and ensure that the motions were properly and constitutionally resolved.

5. The trial judge did not specifically articular that manifest necessity required the mistrial, and the reasons he did articulate do not support a finding of manifest necessity.

6. Mr. Weston argues that the trial was going poorly for the prosecution, and that the prosecutor may have been intentionally provoking a mistrial to get another chance at a conviction. Certainly, a finding that the prosecutor intentionally provoked the mistrial would support Mr. Weston's position. However, it is

unnecessary to decide whether that was the case, and the court declines to do so, especially in light of the fact that the trial judge, who was in a much better position to evaluate the prosecutor's behavior, explicitly determined that the prosecutor did not intentionally provoke the mistrial. R.T. at 437.